Forsyth Electrical Company, Inc. ***and*** **Local Union 342, International Brotherhood of Electrical Workers, AFL–CIO.** Cases 11–CA–16631 and 11–CA–16805

September 29, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On December 3, 1997, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent filed exceptions[1] and a supporting brief. By notice dated June 14, 2000, the Board invited the parties to file supplemental briefs addressing the framework for analysis for refusal to consider and refusal to hire set forth in the Board's May 11, 2000 decision in *FES (A Division of Thermo Power)*, 331 NLRB No. 20. On July 5, 2000, the General Counsel filed his supplemental statement of position; on July 6, 2000, the Respondent filed its supplemental statement of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief, and supplemental statements, and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this decision, and to adopt the recommended Order as modified.

1. Analyzing the refusal to consider allegations of the complaint under *Wright Line*,[3] the judge found that the General Counsel met his initial evidentiary burden of establishing that antiunion animus contributed to the Respondent's decision to exclude three union-affiliated applicants from the hiring process. The judge also rejected the Respondent's defense. Thus, the judge concluded that the Respondent unlawfully failed to consider these three applicants for employment. We disagree and find, in agreement with the Respondent, that the General Counsel has failed to establish the requisite antiunion animus. As set forth in *FES,* supra, in a discriminatory refusal to consider case such as this, the General Counsel has the burden to show at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden shifts to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

Here, the judge found that, rather than considering three qualified, union-affiliated applicants (Phillip Wheeler, Greg Davis, and Gary Maurice), the Respondent rehired former employee Jimmy Brewer, whom the Respondent conceded was not a good employee. Based on the Respondent's rehiring of Brewer but not hiring the union-affiliated applicants, the judge drew an inference of antiunion animus. The Respondent excepts and argues that its willingness to rehire Jimmy Brewer does not establish antiunion animus. We agree with the Respondent, and find that the General Counsel's argument fails for lack of proof.

Unlike the judge, we are unwilling to draw an inference of antiunion animus based solely on the Respondent's decision to rehire Jimmy Brewer. We note that the Respondent offered an explanation for its willingness to give Brewer a second chance. Thus, Respondent offered unrebutted testimony that Brewer did a good job when he first worked for the Respondent, before he started drinking. Brewer was rehired only after he assured the Respondent that he had straightened out. No evidence was offered to rebut this explanation. Nor did the judge find any other evidence of antiunion animus.[4] In these circumstances, we are unwilling to discount the Respondent's explanation for rehiring Brewer. Accordingly, we find that the General Counsel has not carried his burden, and that an 8(a)(3) violation has not been established.

2. The judge found, and we agree, that the Respondent unlawfully refused to grant preferential reinstatement rights to economic strikers David Jones, John Kimball, and Douglas Hill upon their unconditional offers to return to work. The judge rejected the Respondent's argument that it was justified in denying reinstatement because these employees were lazy, unproductive, and ineffective workers. We agree with the judge.

[1] The Respondent has excepted to the judge's finding that the Respondent unlawfully refused to consider for hire union-affiliated applicants Phillip Wheeler, Gregory Davis, and Gary Maurice. The Respondent has also excepted to the judge's finding that the Respondent unlawfully refused to reinstate economic strikers David Jones, John Kimball, and Douglas Hill.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 444 U.S. 989 (1982).

[4] The General Counsel did not except to the judge's failure to find any other evidence of antiunion animus. In particular, we note that the General Counsel did not except to the judge's findings regarding an allegedly unlawful statement made by Foreman Michael Willard.

The Respondent now contends, however, that it was also justified in failing to reinstate these employees because they participated in an unprotected work slowdown.

The Respondent's defense is premised upon the judge's unexcepted-to finding that the Respondent was justified in discharging one employee, Douglas Summers, whom the judge found deliberately and covertly slowed down his production. The judge also found that there was a generalized prestrike work slowdown tied to the Union's salting campaign. The Respondent asserts that this slowdown implicates these three union-affiliated employees. We reject the Respondent's defense. We do not find sufficient record evidence to support a finding that there was a generalized work slowdown. Further, even if there was a slowdown, the Respondent has not shown that Jones, Kimball, and Hill participated in it. And, significantly, the Respondent never mentioned the slowdown at the time it allegedly occurred, at the time the Respondent refused reinstatement, or at the time of the hearing. Therefore, we find that the Respondent has not established that a work slowdown by these three employees was the reason for its refusal of their unconditional offers to return to work. Accordingly, we agree with the judge that the Respondent, by refusing to reinstate Jones, Kimball, and Hall, violated Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Forsyth Electrical Company, Inc., Winston-Salem, North Carolina, is officers, agents, successors, and assigns, shall take the actions as set forth in the Order as modified.

1. Delete paragraph 1(a) and reletter the subsequent paragraphs.

2. Delete paragraph 2(a) and reletter the subsequent paragraphs.

3. Substitute the following for current paragraph 2(b):

"(a) Within 14 days from the date of this Order, offer David Jones, John Kimball, and Douglas Hill full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed."

"(b) Make David Jones, John Kimball, and Douglas Hill whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision."

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to grant employees who have gone on an economic strike against us and who have made unconditional offers to return to work the reinstatement rights to which they are entitled by law, including, in the case of economic strikers whose positions have not been filled by permanent replacements, the right to be reinstated to such positions, and in the case of economic strikers who have been permanently replaced, the right to be given preference when job openings occur in their previous or substantially equivalent positions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL reinstate economic strikers David Jones, John Kimball, and Douglas Hill to their former or substantially equivalent positions to which they would have been reinstated upon making their unconditional offers to return to work, except for our unlawful discrimination against them.

WE WILL make David Jones, John Kimball, and Douglas Hill whole for all losses they suffered because of our discriminatory refusal to reinstate them.

FORSYTH ELECTRICAL CO.

Donald R. Gattalaro, Esq. and *Lisa R. Shearin, Esq.,* for the General Counsel.

Melvin Hutson, Esq. and *Melvin S. Hutson, Esq.* (*Thompson & Hutson*), of Greenville, South Carolina, for the Respondent.

Gary M. Maurice, of Winston-Salem, North Carolina, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. In this case, the General Counsel of the National Labor Relations

Board (the General Counsel) alleges that Forsyth Electrical Company, Inc. (the Respondent or the Company) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by discharging an employee and refusing to reinstate him, by failing and refusing to hire an individual, by failing and refusing to consider certain individuals for hire, and by failing and refusing to reinstate certain individuals whom the General Counsel alleges to have been unfair labor practice strikers. The General Counsel also alleges that the Company violated Section 8(a)(1) of the Act by questioning employees about their union sympathies. I find that Respondent violated Section 8(a)(1) and (3) by refusing to consider certain job applicants for hire, and by refusing to grant strikers the reinstatement rights guaranteed by law. In other respects, I find that Respondent did not violate the Act.

I heard this case in Winston-Salem, North Carolina, on May 28 and 29, 1997.[1]

After the hearing, the parties filed briefs, which I have considered.

FINDINGS OF FACT

I. STATUS OF THE PARTIES

The Respondent has admitted that on July 24, 1995, Local Union 342 of the International Brotherhood of Electrical Workers, AFL–CIO (the Union or the Charging Party) filed a charge against the Respondent in Case 11–CA–16631, and served it on Respondent on July 25, 1995. The Company also has admitted that the Union filed another charge against it, in Case 11–CA–16805, on December 12, 1995, and amended that charge on March 6, 1996. The Respondent also admits it received service of this charge and amended charge on the dates they were filed. I so find.

Additionally, Respondent has admitted that it is a North Carolina corporation with an office located at Winston-Salem, that it is engaged in electrical construction at various jobsites throughout North Carolina, and that during the 12 months before issuance of the complaint on March 14, 1996, it purchased and received at its North Carolina jobsites, directly from points outside the State, goods and materials valued in excess of $50,000. Respondent further admitted, and I find, that it at all times material to this proceeding, it has been an employer engaged in commerce within the meaning of Section 2(5) of the Act.

Moreover, Respondent has admitted that its owner, Fred Benson,[2] Office Manager Dave Hill, and General Field Foreman Ralph Holler are supervisors within the meaning of Section 2(11) of the Act, and its agents. I so find. Respondent also has admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.[3]

[1] On my own motion, I order the transcript corrected in accordance with appendix B [omitted from publications] to this decision.

[2] Following the *United States Government Style Manual*, this decision will not use courtesy titles, such as "Mr.," but no disrespect is intended. A descriptive title may be used occasionally for clarity.

[3] At the hearing, I granted the General Counsel's motion to amend the complaint to allege that Lead Mechanic Michael Willard was also a supervisor. Respondent has not admitted Willard's status as a supervisor, so this issue is in dispute.

II. THE ALLEGED UNFAIR LABOR PRACTICES

1. Disputed complaint allegations

Respondent has denied all complaint allegations that it engaged in unfair labor practices. The complaint, as amended, alleges the violations discussed below.

Complaint paragraph 7 initially alleged that Owner Fred Benson interrogated employees about their union sympathies on July 11 and 19, 1995. However, at the hearing, the General Counsel moved to amend this paragraph by deleting the allegation that Benson interrogated employees on July 11, 1995. I granted that motion. (Tr. 380.)

Paragraph 7(a) retains the allegation that Benson interrogated employees about their union sympathies on July 19, 1995, and complaint paragraph 16 alleges that this action violated Section 8(a)(1) of the Act.[4] There is no paragraph 7(b).

Complaint paragraph 8 alleges that on July 24, 1995, the Respondent discharged employee Douglas Summers and thereafter refused to reinstate him. Complaint paragraphs 16 and 17, respectively, allege this action violates Section 8(a)(1) and (3)[5] of the Act.

The General Counsel amended complaint paragraph 9 twice before the hearing, and modified it further by oral motion during the hearing. In its final form, it alleges that Respondent has failed and refused to consider for hire a number of individuals, and also, that Respondent failed and refused to hire another person.

Specifically, complaint paragraph 9(a) alleges that the Company failed and refused to consider for hire (on the dates specified here in parentheses) and has continued to fail and refuse to consider for hire the following persons: Phillip Wheeler (July 17, 1995), Gregory Davis (July 20, 1995), and Gary Maurice (July 21, 1995).[6]

Complaint paragraph 9(b) alleges that on June 6, 1995, the Respondent failed and refused to hire Christopher Hill, and has continued to fail and refuse to hire him since that time. Complaint paragraphs 16 and 17 allege that the actions described in complaint paragraph 9 violate Section 8(a)(1) and (3) of the Act.

[4] Sec. 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the Act. 29 U.S.C. § 158(a)(1). Sec. 7 of the Act grants employees the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and also "the right to refrain from any or all of such activities . . . " 29 U.S.C. § 157.

[5] In general, Sec. 8(a)(3) of the Act prohibits an employer from encouraging or discouraging membership in any labor organization by discrimination in regard to hire or tenure of employment or any term or condition of employment. See 29 U.S.C. § 8(a)(3).

[6] By motion at the hearing, which I granted, the General Counsel deleted the allegation in complaint par. 9(a) that on or about July 18, 1995, Respondent failed and refused to consider Rodney Booe for hire. (Tr. 380.)

Complaint paragraphs 10, 11, and 12 allege that certain employees[7] engaged in an unfair labor practice strike against the Company. Complaint paragraph 13 alleges that these employees made unconditional offers to return to work on specified dates from August 17, 1995, through November 10, 1995.

Complaint paragraph 14 alleges that the Company failed and refused to reinstate the employees named in paragraph 13. Complaint paragraphs 16 and 17 allege that the refusal to reinstate, alleged in paragraph 14, violates Section 8(a)(1) and (3) of the Act, respectively.

2. The evidence

This case involves "salting," which the Union's business manager, Gary Maurice, defined as "the act of going to work for non–Union employers for the purpose of organizing. [The term 'salting'] was coined from the phrase of salting of mines where you put more valuable minerals in a mine to raise its value. Likewise, we take our union members and salt them into nonunion employers work forces in order to access the electricians out there in an attempt to organize." (Tr. 74.) Maurice further explained that "salts" could be classified as "covert" or "overt," depending upon whether they disclosed their union affiliation to the prospective employer.

Maurice's testimony indicates that his Union's effort to "salt" the Respondent began on June 6, 1995, when he suggested to two unemployed union members, Douglas Summers and Douglas Hill, that they apply for work at Forsyth Electrical. (Tr. 76–77.) They followed Maurice's instructions and got jobs with the Respondent.

The complaint alleges that the Respondent discharged Summers unlawfully on July 24, 1995. It also alleges that Hill went on strike that same day, made an unconditional offer to return to work on August 25, 1995, but was not offered reinstatement.

However, even though Summers and Hill began work for the Company at the start of the Union's "salting" campaign, the complaint alleges that the Respondent discriminated against other employees first. For clarity, I will defer for a moment the discussion of what happened to Summers and Hill, and instead describe the alleged unfair labor practices in chronological order.

A. Refusal to Hire Christopher Hill

The earliest unfair labor practice alleged in the complaint, as amended, took place on June 6, 1995. On that date, complaint paragraph 9(b) states, "Respondent failed and refused to hire, and continues to fail and refuse to hire . . . Christopher Hill." (GC Exh. 1(w).)

June 6, 1995, is the same date when, according to Union Business Manager Maurice, he spoke to Douglas Summers and Douglas Hill, and urged them to become covert salts. Unlike these two men, Christopher Hill is not a union member. (Tr. 277.)

Nonetheless, Hill's car displayed a union bumper sticker, and he drove that car to Forsyth Electrical on the day he applied for work. According to Hill, he spoke with Respondent's owner, Fred Benson, and the two reached agreement on Hill's rate of pay. Then, Benson left briefly to get tax forms for Hill to complete.

Hill testified that while Benson was gone, "a gentleman came out and asked if one of the two of us owned a brown Honda sitting out front, and I said yeah, it was mine, and he said could I move it, so I went out and moved it to the lower parking lot." (Tr. 278.)[8] According to Hill, after he completed the tax forms, he and Benson agreed that he would report to work that Friday.[9]

On June 8, 1995, the day before Hill was supposed to start work, he received a message from Benson on his answering machine, stating that Benson had checked Hill's references, and that his services were not needed.[10] Hill called Benson, who told him that he had called Hill's previous employer, Regency Electric. (Tr. 280.)

Respondent's refusal to hire Hill is not in dispute. Benson admitted offering Hill employment on June 6, 1995, and also admitted telling Hill later that he had checked a reference and that Hill's services would not be needed. (Tr. 20.)

On the other hand, Benson's reasons for withdrawing the job offer differ from those alleged by the General Counsel. The General Counsel asserts that the day Christopher Hill applied for work, the person who asked him to move his car was Respondent's office manager, Dave Hill, an acknowledged supervisor. Since Office Manager Dave Hill saw Christopher Hill's car, the General Counsel contends, he had the opportunity to notice the union bumper sticker and thus knew of Christopher Hill's prounion sympathies. (GC Br. at 3–4.)

Benson denied knowing that Hill had a union bumper sticker on his car. Benson also testified that before the Union filed unfair labor practice charges in this case, he had not known about Hill's union affiliation. (Tr. 411.)

Benson's explanation for why he withdrew the job offer begins at a point where his testimony diverges from Hill's. Although Hill testified that he and Benson agreed that Hill would report to work 3 days later, Benson recalled they agreed Hill would begin work the day after the June 6, 1995 job interview. When Hill did not show up on that date, Benson became, in his words, "a little curious." Therefore, he examined Hill's application, and decided to check on Hill's references. (Tr. 405–406.)

The employment application indicated that Hill previously had worked at Regency Electric, and Benson testified that he contacted Kenneth Hodges at that company. Although Hodges would not provide much information, Benson said, he did tell

[7] These employees were Ray Singleton (alleged to have gone on strike on July 10, 1995), David Jones and John Kimball (on July 19, 1995), Douglas Hill (on July 24, 1995), and Bobby Barnett (on July 31, 1995).

[8] Christopher Hill testified that he was talking with another job applicant, Douglas Summers, when the gentleman came out and asked about the car. Although Summers testified, he did not refer to this incident. Office Manager Dave Hill did not testify.

[9] I take notice that July 6, 1995, was a Tuesday, and therefore, he was to report for work 3 days later. Hill testified he could not report for work sooner because his grandfather had died. (Tr. 278.)

[10] Benson's testimony differs from Hill's as to when Benson told Hill that his services would not be needed. Benson recalled that telephone conversation taking place on Friday, June 9, 1995, rather than on Thursday, June 8, 1995. (Tr. 409.)

Benson that Christopher Hill was not eligible for rehire. (Tr. 21.)

However, when the General Counsel called Hodges as a witness, he denied ever speaking with Benson, and also denied that anyone had called him seeking information about Christopher Hill. (Tr. 55.) Hodges, who had been a "leadman or foreman" at Regency Electric, did testify that Hill had worked for him. When asked whether he had any problems with Hill, Hodges answered, "Best I remember he didn't work regular but other than that I think he had a lot of personal problems." (Tr. 58.)

When asked whether Regency Electric had terminated Hill's employment, Hodges responded, "He got gone. I don't know if he was terminated or he just quit." (Tr. 56.)[11]

If, as the General Counsel submits, Benson fabricated the story that he contacted Regency Electric, it is difficult to understand why Benson would craft a falsehood so easily disproved. In other words, why would he identify Hodges specifically as the person contacted, and thus create the possibility that Hodges would be called to refute him? As a lie, it would be more convenient simply to say that he spoke with someone in Regency Electric's office, but did not get that person's name.

On the other hand, Hodges had no reason to dissemble. He was not employed by Regency Electric at the time of the hearing. So even if Regency had a rule against foremen giving job references, Hodges would not have much to fear by admitting he broke that rule. Moreover, he was not a member of the Union, and thus, presumably, had little interest in giving testimony to support the Charging Party's case.

It concerns me that Hodges did not remember whether Hill quit his job at Regency Electric or had been discharged. All Hodges said was that Hill "got gone." Significantly, Hodges did not recall whether or not Hill was working on Hodges' crew at the time Hill's employment ended. If a foreman lost one of his employees during a job, that fact reasonably would make an impression.

Moreover, Hodges knew Hill well enough to testify that Hill had "a lot of personal problems." He also knew Hill well enough to remember that he "didn't work regular." Therefore, it seems unlikely that Hodges would be unaware, as he professed, of whether Hill had quit or was fired.

My overall impression is that Hodges did not want to become involved in this matter at all. If so, that would be consistent with Benson's testimony that Hodges told him very little, except that Hill was not eligible for rehire.

In sum, Hodges' testimony inherently seems less credible than Benson's. I therefore credit Benson's.

In making the decision not to hire Hill, Benson testified, he also had another source of information besides Hodges; he spoke with Steve Holler, the son of Respondent's field coordinator, Ralph Holler Sr. According to Benson, Steve Holler told him "[Y]ou need to be very careful Fred because [Christopher Hill] doesn't show up for work and he's been known to travel in groups of people that do cocaine." (Tr. 408.)

Steve Holler did not testify. No evidence contradicts Benson's testimony, and Hill's own testimony tends to support the accuracy of the statement which Benson attributed to Holler.

Thus, when asked on cross-examination if he had used illegal drugs in 1995, Hill replied, "I may have some." (Tr. 291.) Additionally, as noted, Hill admitted that while working at Regency Electric, "I just sometimes would take a couple of days off." (Tr. 202.) That admission establishes a factual basis for Holler's statement to Benson that Hill "doesn't show up for work."

The fact that Hill's testimony tends to support the truth of Holler's reported statement does not establish that Holler actually made such a report to Benson, but if anything, it makes it more likely. Additionally, as noted, no evidence contradicts Benson's testimony on this point. Therefore, I credit it.

Finally, I find that the record discloses no evidence that Benson was aware of Hill's union sympathies, or of the union sticker on Hill's vehicle, at the time Benson decided to rescind the job offer.[12] Therefore, I conclude that Benson's decision not to hire Hill was not motivated by unlawful animus.

B. Alleged Refusal to Consider Phillip Wheeler for Hire

Complaint paragraph 9(a) alleges that Respondent failed and refused to consider Phillip Wheeler for hire on or about July 17, 1995, and continues to fail and refuse to consider him for hire. Wheeler testified that Union Business Manager Maurice told him that Respondent was hiring. On July 17, 1995, Wheeler went to Forsyth Electrical and applied for work as a journeyman electrician. He further testified as follows:

> Q. What happened when you arrived at their office?
>
> A. I walked in and talked with a man. I can't—I don't recall his name; told him that Gary Maurice had sent me over, and he—Mr. Maurice told me that they were doing some hiring from Local 342, and he told me—the guy at the office told me that at the time they weren't doing any hiring, but I could put in an application and they would keep it on file. [Tr. 239.]

Although Wheeler submitted an application, he testified, no one from the Company contacted him. Wheeler did not know with whom he spoke at Forsyth Electrical and, on cross-examination, stated that he did not think the individual was Benson, who was then in the courtroom. [Tr. 243.]

[11] Whether or not Christopher Hill actually had an attendance problem while working at Regency Electric is, of course, collateral to the issue of what motivated Benson to rescind the offer of employment. That issue depends on whether Benson had a reason to believe Hill had an attendance problem and if, so, how much this belief influenced Benson's decision.

Hill's testimony about his work experience while at Regency may be relevant in determining the likelihood that Benson received a negative report about Hill's past work. Hill denied that Regency Electric had discharged him. His also denied that he had experienced attendance problems at this job, although his testimony on cross-examination could be interpreted either way:

> Q. Did you work at that job on a regular basis?
>
> A. Mostly, yes.
>
> Q. You had attendance problems at that job, didn't you?
>
> A. Not problems. I just sometimes would take a couple of days off. [Tr. 282.]

[12] The General Counsel urges that I draw an adverse inference establishing such knowledge from Respondent's failure to call Office Manager Hill to testify. My rejection of this argument will be discussed below.

Wheeler stated that he did not wear any union insignia when he went to the Respondent's office. However, he did put down on his application that on a previous job he had earned $20.95 per hour which, he testified, was union scale. [Tr. 247.]

I credit Wheeler's testimony and find that he filed an application for employment with Respondent on July 17, 1995. Further, I find that Respondent did not offer him employment.

C. Alleged instance of Interrogation

Considering the complaint allegations in chronological order, the next violation allegedly occurred on July 19, 1995, when, according to complaint paragraph 8(a), Owner Benson interrogated employees about their union sympathies.

Employee Bobby Lee Barnett testified that he was on a ladder at a jobsite on that date, when Benson entered the jobsite and then yelled up to him, asking, "Are you Union?" According to Barnett, he replied, "What's the problem, I just told Mike Willard the other day that I wasn't Union." (Tr. 351.)

Barnett testified that Benson "continued to say that he knew about the union salting program and the comet program and that he felt that he was paying his key people an equivalent to what he would think union scale." Barnett further testified that he responded "No, I'm not Union. We've got more problems than that, we need help on this job." (Tr. 350.) Benson denied ever asking Barnett anything about the Union. (Tr. 442.)

Barnett was not certain whether another person, Michael Willard, was still present when Benson yelled up to Barnett on the ladder. (Tr. 366.) Willard testified after Barnett but was not asked, either on direct or cross-examination, whether he was present during this conversation or heard what Benson said.

I do not credit Barnett. As discussed below, Barnett also testified that he did not quit. Two witnesses contradicted Barnett on this point, and I credited the corroborated testimony rather than Barnett's uncorroborated version. I find Barnett's uncorroborated testimony unreliable here, as well.

D. Alleged Refusal to Consider Gregory Davis for Hire

Complaint Paragraph 9(a) alleges that on or about July 20, 1995, the Respondent failed and refused, and continues to fail and refuse, to consider Gregory Davis for hire. Davis testified that on July 20, 1995, he drove to Respondent's office and parked his truck, bearing union stickers, about 6 to 8 feet from the office door.[13] He further testified as follows:

> I went inside and asked if they were doing any hiring and the fellow in there said no, we're kind of winding down right down. I asked if I could fill out an application. He said no, we're not giving out any applications and said that they were winding down and I said well, I had heard that you were doing some hiring. I thought I would come by and fill out an application. He said no, and then I asked if I could leave my name and telephone number with him should things change in the future maybe he could give me a call. [Tr. 188.]

Davis further testified that he did not know the name of the man with whom he spoke. However, he did not believe that the man was Benson, who was in the courtroom at the time Davis testified. (Tr. 193.)

He returned to the company offices 2 weeks later and spoke with a different person, whose name he did not know. Davis described this conversation as follows:

> I explained that I had been down there once and tried to put in an application and that I was told they weren't hiring and weren't giving out any applications at that time. I explained to him that I had left a phone number and my name with the guy before that if anything changed would he please get in touch with me. [Tr. 191.]

Davis testified that about 2 weeks later, he telephoned the Respondent's offices, and spoke with a man, but did not know his name. He asked the man if the Company had started hiring, and the man said that "we're still not hiring." According to Davis, the Respondent has never contacted him about employment. (Tr. 191.) I credit Davis' testimony.

E. Alleged Refusal to Consider Gary Maurice for Hire

Complaint paragraph 9(a) alleges that on or about July 21, 1995, and continuing thereafter, the Respondent failed and refused to consider Gary Maurice for hire.[14] As noted above, Maurice is business manager of the Charging Party. He is also a licensed electrician with extensive qualifications.

Maurice testified that on July 15, 1995, he visited the Forsyth Electrical office, spoke with Ralph Holler, the Respondent's field coordinator,[15] and asked Holler for a job application. Maurice described Holler's response as follows:

> Well, I told him I was interested in employment and would like to fill out an application. He commented that—he said you don't work. I said no, quite the contrary. In fact, just a couple of weeks ago I was employed by Jackson Electric on a remodel—major remodel at the Sears Store in Hanes Mall in Winston–Salem here and asked him how his manpower was. What his manpower needs were and Ralph said I need six or seven men right now immediately.
>
> . . . .
>
> He did give me an application and he said, you know, I have nothing against the Union. In fact, he said I've got a couple of your boys working for us right now and doing a pretty good job and I responded. I said well, you might actually have more than just a couple but he didn't respond. That quizzical look but no verbal response to that.

[13] On cross-examination, Davis testified that he did not wear any union insignia on his clothes when he went inside the office to apply for a job. (Tr. 193.)

[14] In a motion included in his posthearing brief, the General Counsel sought to amend the complaint to allege that Respondent had failed and refused to consider Maurice for employment beginning on July 13 rather than July 21, 1995. Respondent has opposed this motion. My decision to deny it will be discussed below.

[15] The Respondent employs both Field Coordinator Ralph Holler Sr. and his son, Foreman Ralph Holler Jr. Although Maurice's testimony does not indicate with which man he spoke, from the entire record it appears to have been Ralph Holler Sr. on this occasion.

> I told [him] I was interested in working. He said well, I don't know about that. He said I'll pass that on to Fred as well. I said well, I'll get my application filled out and back to you. Since you're needing help I'll see if I've got some people interested and I'll send them out to you. He said well, we do need help. At that point I left and returned to my office. [Tr. 78–79.]

Ralph Holler Sr. corroborated Maurice's testimony that he came to the company office and requested an application, but Holler expressly denied telling Maurice that Forsyth Electrical needed six or seven more employees. (Tr. 545.) Rather, Holler testified, "I told him that we're not hiring, but if he wanted to take an application you're welcome to take one." (Tr. 564.)[16]

Alan Mather, employed by Respondent as a "foreman mechanic," testified that he was present when Maurice visited the Company office and asked Holler for an application. Mather testified that Holler did not tell Maurice that the Respondent needed six or seven more employees. (Tr. 574.)

Both Holler and Mather remain employed by the Respondent, and thus are not disinterested witnesses, but neither is Maurice, the Charging Party's business manager. Based on all the circumstances, including that Mather corroborated Holler's testimony rather than that of Maurice, I credit Holler. I find that he did not tell Maurice that Respondent needed six or seven more employees.

On July 19, 1995, two of Respondent's employees, John Kimball and David Jones, engaged in what Maurice termed an "unfair labor practice strike." Maurice denied that he directed these two individuals to go on strike, but stated, "I suggest that as their option." (Tr. 131.)

Maurice testified that he helped them make picket signs and then, at about lunchtime on July 19, picketed with them at a jobsite at Oak Hollow Mall in High Point, North Carolina.[17] After lunch on that date, Maurice and the other two men picketed another of Respondent's jobsites, the "Hannaford supermarket site." (Tr. 88.)[18]

On cross-examination, Maurice denied that he endorsed or ratified the strike. However, he did admit, in effect, that he "guided" the strike:

> Q. Did you support that strike, endorse it, or ratify it in any way?
>
> A. Not endorse it, ratify it, but if that's where it's going and where the employees want to go, willing to go in some instances yes, I will guide them through a strike.
>
> Q. In fact, you participated in strike activities by carrying a picket sign yourself, didn't you?
>
> A. Yes, I did.
>
> Q. How long did that strike last? Did it last until November when the last person offered to return to go to work?
>
> A. Yes, sir. [Tr. 150.]

Maurice testified that on July 21, 1995, he returned to the Respondent's office and tendered his completed job application. (Tr. 151; 83–84.) Specifically, Maurice said he arrived at the Forsyth Electrical office about 7:30 a.m., and turned in his application to Ralph Holler. Maurice recounted that although Holler said the Company was not taking applications, Holler accepted the application anyway. (Tr. 84.) It is undisputed that Respondent did not hire Maurice. (See, e.g., Tr. 486.)

Owner Benson testified that he did not consider Maurice to be a serious job applicant. He explained that he did not object if Respondent's employees supplemented their income by doing some other work on their own time, such as wiring a house, so long as it did not interfere "with their main job, which is Forsyth Electric." (Tr. 448.)

The Respondent permitted such moonlighting because the employee's main focus remained on his work with the Company. However, Benson testified, "I do not believe that Gary Maurice's main focus would be Forsyth Electric." (Tr. 449.)

F. Respondent's Resumption of Hiring

The General Counsel must establish that Respondent was hiring or had concrete plans to do so, as a predicate to proving that it refused to consider certain applicants because of their ties to the Union. The evidence establishes that Respondent had suspended hiring during the latter part of July 1995. However, a list attached to Benson's pretrial affidavit, introduced at the hearing, shows that Respondent began hiring workers again on about August 1, 1995.

Respondent hired John Anderson on September 19; Jimmie Brewer on September 8; Steve Buchanan on August 16; Bradley Griffin on August 1; a helper surnamed Hard on September 7; and Michael Workman on August 6. (GC Exh. 19.) On cross-examination, Benson admitted that his Company rehired Jimmie Brewer even though Benson considered Brewer a terrible employee:

> Q. You said Jimmy Brewer was a horrible employee.
>
> A. He was.
>
> Q. And yet you rehired him on September 8th of 1995.
>
> A. That's true.
>
> Q. You hired him rather than hire Union help didn't you?
>
> A. No.
>
> Q. You didn't hire Gary Maurice did you?
>
> A. No.
>
> . . . .
>
> Q. Jimmy Brewer . . . he has this poor performance now at time of hearing, correct?

---

[16] Holler did not indicate whether or not he told Maurice that he had a couple of "your boys" (union electricians or helpers) working for him at that time.

[17] Maurice referred to this location as the "Victoria's Secret" jobsite.

[18] This strike officially ended on November 10, 1995, when Maurice sent Benson a letter, on union letterhead, stating in part as follows:

> This correspondence shall serve to notify you that employees John W. Kimball and Bobby Lee Barnett, who have been on an Unfair Labor Practice Strike against your firm, have ended their Strike and agree to return to your employ unconditionally. Messrs. Kimball and Barnett, along with employees David L. Jones, Douglas W. Hill, and Ray Singleton, who have all previously notified you that they had ended their Strikes and agreed to return to your employ unconditionally, are still awaiting reinstatement.
>
> Please notify me at 721–0400 where they are to report to. [GC Exh. 5.]

A. No, he's always had poor performance.
Q. But you hired him back.
A. I did. [Tr. 468, 471.]

Based on this testimony, it appears clear that Respondent had taken Wheeler, Davis, and Maurice out of consideration for employment. There is no other way to explain why Respondent would rehire somewhere who had "always had poor performance" rather than give at least one of them a chance.

I find that Respondent resumed hiring on or about August 1, 1995. Further, I find that at this time, Respondent did not consider applicants known to have union affiliations.

G. The Strike Against Respondent

Complaint paragraph 10 alleges that on or about July 10, 1995, employee Ray Singleton went on strike against the Respondent. Complaint paragraph 11 alleges that employees David Jones and John Kimball "ceased work and engaged in a strike" against Respondent on July 19, 1995, that Douglas Hill went on strike on July 24, 1995, and that Bobby Barnett went on strike on July 31, 1995. Complaint paragraph 14 alleges that Respondent, "since on or about August 17, 1995, and continuing thereafter, has failed and refused to reinstate the employees named . . . . in paragraph 13."

The complaint alleges that the strikers gave the Company unconditional offers to return to work on dates ranging from August 17, 1995, in the case of Singleton and Jones, to November 10, 1995, in the case of Kimball and Barnett. Thus, the complaint necessarily implies that the strike spanned a 4-month period from July 10 to November 10, 1995.

However, the only picketing during this alleged 4-month strike took place on July 19, 1995, and then, at most, for several hours. Additionally, the Union found immediate jobs for some individuals, typically at better rates of pay.

The complaint does not allege that unfair labor practices *caused* the strike, but complaint paragraph 11 alleges that unfair labor practices *prolonged* it. It is not apparent from the face of the complaint what alleged unfair labor practices the General Counsel asserts prolonged the strike. The complaint also does not state on what date the strike allegedly was converted from an economic strike to an unfair labor practice strike, although the General Counsel's brief indicates that date was July 19, 1995.

There is some difference between the acts alleged as unfair labor practices in the complaint, and the "unfair labor practices" which, under the General Counsel's theory, prolonged the strike and converted it into an unfair labor practice strike. Stated another way, the General Counsel's witnesses described their reasons for going on strike, but these reasons did not always concern the actions which the complaint asserted as violating the law.

For example, the General Counsel asserts that employee Ray Singleton informed Respondent "that he was going on an unfair labor practice strike as a result of having been required to waive his workmen's compensation rights." (GC Br. at 34–35.) Yet the complaint contains no allegation that the Respondent required Singleton or any other employee to waive workers' compensation rights or that it violated the Act by doing so. The General Counsel has neither explained how such action would constitute an unfair labor practice nor cited authority to support such a proposition.

As described in the General Counsel's brief (but not alleged in the complaint), another employee, David Jones stated he went on strike "because Respondent had removed some union stickers from a gang box a few days before." However, the complaint contains no allegation that the Respondent committed such an unfair labor practice. Moreover, the record does not include evidence suggesting that Respondent engaged in such activity.

According to the General Counsel, Jones also asserted that he decided to go on strike because he believed the Respondent "had unlawfully denied him a foreman's position." (GC Br. at 35) Again, neither the original complaint nor any amendments to it alleged that the Respondent committed such an unfair labor practice.[19]

[19] In his brief, the General Counsel tries to sew together the different reasons given by individual strikers into a quilt which covers the entire strike with a single theme. However, the result is a crazy quilt at best if the strikers' individual reasons are taken at face value. The strike makes sense only by looking behind these reasons to the central role of the union business manager. This point seems clear from the way in which the General Counsel's brief goes from the strikers' separate reasons to a conclusion that they were united in protesting Respondent's "discriminatory hiring practices." After summarizing some legal principles applicable to strikes and strikers, the General Counsel's brief states, in part, as follows:

> As we have shown, beginning on July 10, five employees went on strike: Singleton on July 10; Kimball and Jones on July 19; Douglas Hill on July 24; and Barnett on July 31. Initially, on July 10, Singleton informed Benson that he was going on an unfair labor practice strike as a result of having been required to waive his workmen's compensation rights. Singleton added that if Benson had any questions, he could contact Maurice. [Tr. 254.]
>
> On July 19, both Kimball and Jones went out on strike. Jones testified that he informed Benson that he was going on strike because Respondent had removed some union stickers from a gang box a few days before. Jones testified that another reason for striking was that he felt that Respondent had unlawfully denied him a foreman's position. Jones also referred Benson to Maurice if he had any questions. [Tr. 161–162.)] Respondent's discriminatory hiring practices directly precipitated Kimball's strike on July 19. As early as July 13, Kimball had a conversation with Field Coordinator Holler over the fact that Respondent was short–handed. [Tr. 225–226.] Kimball further testified that on July 18, Holler asked him to work overtime because Respondent was understaffed. By that time, Kimball was well aware that Respondent had an insufficient work force and needed additional help, but was not even allowing known union applicants to fill out an application. After conferring with Business Manager Maurice that night, Kimball decided that due to Respondent's refusal to hire union applicants that he would go on strike. [Tr. 136–137, 226–227.] Accordingly, on July 19, Kimball informed Holler that he was going on an unfair labor practice strike, and if Holler had any questions to contact Maurice. [Tr. 227–228.] Jones and Kimball picketed together for a few hours that day. [Tr. 163–164, 228.]
>
> A few days later, on July 24, Douglas Hill went on strike. Prior to going out on strike, Hill had had several conversations with Benson over Respondent's inadequate staffing. [Tr. 201–203.] Hill informed Benson that he was going on strike because of the working conditions and hiring circumstances and referred Benson to Maurice for more details. [Tr. 201–203.]

From his brief, it appears that the General Counsel contends that the following alleged acts were unfair labor practices which prolonged the strike and converted it into an unfair labor practice strike:

1. Respondent had required Ray Singleton to waive workers' compensation coverage as a condition of coming to work for the Company, and this action was, at least initially, Singleton's reason for "going on an unfair labor practice strike."[20]

2. David Jones ceased work on July 19, 1995, for a different reason. Jones was concerned that someone had removed a union sticker from the "gang box" in which the workers kept their tools. Jones also testified that he went on strike because he "kind of felt like I had been denied a foreman's position for the week that Doug Summers was going to be gone because of my union affiliation." (Tr. 162.)[21]

3. John Kimball went on strike, in the General Counsel's words, because he was "well aware that Respondent had an insufficient workforce and needed additional help, but was not even allowing known union applicants to fill out an application" causing Kimball to have to work overtime.

4. Douglas Hill went on strike after explaining to Owner Benson that he was doing so because of the "working conditions and the hiring circumstances . . . ." Although Hill's explanation isn't clear, it apparently refers to the same reasons expressed by Kimball, a perceived shortage of workers and Respondent's alleged discrimination against job applications because of their union affiliations.

5. Bobby Lee Barnett advised Foreman Mike Willard on July 31, 1995 that he was going to "join the existing unfair labor practice strike," because of his concerns that the Respondent was not hiring job applicants who had union affiliations.[22]

The individuals named in the complaint ceased work on several different dates, and they expressed a number of reasons for doing so. I will consider the evidence concerning each person in chronological order.

(1) Ray Singleton

Singleton testified that he applied for work on June 28, 1995, that Respondent hired him the same day as an electrician helper (Tr. 249) and at Owner Benson's request, he signed a form captioned "Subcontractor's Waiver of Workers Compensation Coverage." (Tr. 252; GC Exh. 4.)

Later, Singleton discussed this form with Union Business Manager Maurice, and concluded that it was "illegal for them not [to be] taking out taxes." (Tr. 254.)[23] On July 10, 1995, after receiving a call from Maurice,[24] Singleton went to the Respondent's office and told Benson he was "going on an unfair labor practice strike." (Tr. 254.)

Benson asked him why, and Singleton replied, "Because of the waiving my rights for workman's comp." According to Singleton, Benson said that he did not understand, and Singleton said that Benson should get in touch with Maurice. (Tr. 254.)

Benson's account of this conversation differs significantly. Benson testified that some time around July 14, 1995, Ray Singleton came to his office and said, "I've got to have two more dollars an hour," to which Benson replied, "Ray, I can't do that." (Tr. 423.)

According to Benson, Singleton then repeated his request for the raise, but Benson would not agree, instead reminding Singleton that he had been hired for temporary work lasting a few weeks. Benson quoted Singleton as responding, "Well, I'm going to have to file an unfair labor practice suit against you then." (Tr. 423.) Based on my observations of the witnesses, I credit Benson.

Finally, Barnett went out on strike on July 31. Foreman Willard, who we contend is a supervisor, had earlier informed Barnett that despite the fact that Respondent had not hired enough manpower to get through the jobs, Respondent was not going to hire union. [Tr. 352.] In addition, Barnett had remarked to Benson on at least two occasions that he was concerned about Respondent's lack of personnel. [Tr. 350–351, 353.] On the first day that Barnett struck, after being unable to find Benson, he informed Foreman Willard that he was going to join the existing unfair labor practice strike and that all they wanted was for Respondent to stop discriminating by refusing to hire union members. (Tr. 355.)

Thus, the facts show that the strike that had economic considerations at its origins, converted to an unfair labor practice strike as of July 19. The causal nexus between the strike and Respondent's unfair labor practices is clear. The employees who struck were in contact with Business Manager Maurice and they relayed their concerns that Respondent needed more manpower. [Tr. 80–81, 83–87, 118, 123–124, 131, 133, 136–137, 143.] At least three of the striking employees informed Respondent that they were concerned with Respondent's understaffing, and at least two—Douglas Hill and Barnett, specifically informed Respondent that they were striking because of Respondent's discriminatory hiring practices. In addition, when Maurice returned his application to Respondent on July 21, he made it clear to Benson and Holler that the employees were striking because of Respondent's refusal to hire union applicants at a time when Respondent was in desperate straits. [GCs Br. at 34–36.]

[20] Timing calls the logic of this argument into question. Singleton began his work stoppage, allegedly to protest the waiver of workers' compensation rights, on July 10, 1995, the date the General Counsel asserts the strike began. If forcing Singleton to waive workers' compensation were an unfair labor practice prolonging the strike, as the General Counsel contends, the strike would have been an unfair labor practice strike at its beginning on July 10, 1995, when Singleton stopped work in protest. Yet the General Counsel contends that the strike at that point was economic, becoming an unfair labor practice strike 9 days later.

Conceivably, the fact that Singleton was the sole striker on July 10, 1995, might have led the General Counsel to conclude that Singleton's action was unconcerted and unprotected that this point. However, the General Counsel has not taken such a position, which would be contrary to the allegations in the complaint.

[21] As noted above, neither allegation appears in the complaint.

[22] Barnett testified he told Willard, "Mike, all we want is for Fred [Benson] to hire us, stop discriminating against us because we're Union." [Tr. 355.]

[23] It is not clear whether, by "taxes," Singleton was referring to the payments which an employer must make to obtain workers' compensation insurance coverage for an employee, or income taxes which would be withheld from the paycheck of an employee but not from the payment made to an independent contractor.

[24] It appears that Singleton may have been at work when he received that call. He testified that he did some work for Respondent on the morning of July 10, 1995, before informing Benson that he was going on strike. (Tr. 264.)

In his testimony about this conversation with Singleton, Benson then described the following exchange:

> A. I said, "Why, I told you I would pay you $8, you would work for a couple of weeks—why are you doing this, why are you coming in and asking me for two more dollars an hour and if I don't pay it to you you're going to file a suit against me?"
>
> He said, "Well, we're just going to have to call Gary Maurice." [Tr. 424.]

The same day Singleton informed Benson that he was going on strike, he began work for another employer, F & F Construction, at a higher wage rate than he had been paid at Forsyth Electrical. Singleton testified that Maurice had told him about this position. (Tr. 266–267.) I find that Singleton knew about this position at the time he told the Respondent he was going out on strike.

Singleton did not claim that he picketed the Respondent. Based on his testimony and the record as a whole, I find that he did not.

Singleton did testify that on August 17, 1995, he went to the Respondent's office and spoke with a man named "Dave," whose last name Singleton did not know. Singleton further testified that he told the man "I was ending my strike—come back to work unconditionally, and he said he wasn't in charge of hiring people, that he would relay the message to Fred." (Tr. 255.) Singleton has not worked for Respondent at any time after July 10, 1995.

The record establishes that Respondent rehired other helpers on and after the date Singleton offered to return to work, but did not offer Singleton employment. Benson explained that he did not believe Singleton could do certain tasks that the helpers actually hired could do. These tasks included bending pipe, installing junction boxes, and reading circuit diagrams. (Tr. 492.)

(2) David Jones

David Jones testified that he began work for Respondent in June 1995, as a journeyman electrician at the "Hamrick's" jobsite at the Market Place Mall. (Tr. 157.) He began wearing union T–shirts a week or two after beginning work. (Tr. 158.)

On July 19, 1995, Jones told Benson that he was going on strike, "and if he needed any more information to call the Hall and speak with Gary [Maurice]." (Tr. 161.) Although Jones' testimony is somewhat ambiguous on this point, it appears that he decided to go on strike because someone had removed a prounion sticker from the common box used by men at the jobsite to store their tools. As noted above, the General Counsel did not allege any violation concerning this matter in the complaint.

Jones also testified that he went on strike because he had wanted to be a foreman for 1 week while another worker was gone, but the Respondent had denied him this position. Jones believed that his open affiliation with the Union was the reason for denial of this temporary promotion. (Tr. 162.) Again as noted above, the complaint does not allege that the Respondent committed any unfair labor practice by denying Jones a promotion.

Jones testified that he picketed for about an hour or two, along with John Kimball. He also testified that after going on strike July 19, he did not work elsewhere until November 1995. (Tr. 184.)

According to Jones, he offered to return to work by telephone on August 17, 1995: "I called Forsyth Electric and spoke with Mr. Dave Hill and told him I was out of work looking for some work and if they had something to develop, you know, that I would like to come on back to work." After checking, Hill told Jones that they "didn't have nothing right now and they didn't see nothing coming up. That they was going to try to finish the jobs that they had with the people they had." (Tr. 164.)

Two or three days later, Jones visited the company offices and spoke with Office Manager Hill. However, Hill told Jones essentially the same thing he had said in the earlier telephone conversation. (Tr. 165.)

Benson testified, in part, that he would not consider Jones for future jobs because he had concluded that Jones was lazy and unproductive. (Tr. 434.) He cited time records to support his conclusion that Jones "spent very, very little time getting the work done and getting it done correctly."

Additionally, on some evenings and weekends, Benson and other members of management worked at jobsites installing light fixtures. While doing so, Benson noticed that some 277-volt fixtures had not been installed properly. He testified that light fixtures that had been wired by Jones and Singleton had no ground screws or grounding, and therefore presented a safety hazard. (Tr. 428.) Benson considered David Jones responsible for this problem because Benson had seen Jones working in the area where he discovered the ungrounded fixtures. (Tr. 429.).[25]

(3) John Kimball

Kimball testified that he applied for work at the Company on July 6, 1995. At the suggestion of Union Business Manager Maurice, he removed a union sticker from his truck before driving it to Respondent's office, and he did not wear anything which would identify him with the Union. In listing his work history, Kimball omitted reference to one contractor which used union electricians. (Tr. 222–224.)

The next day, Kimball received a telephone call from the Company's office manager, asking him to meet with Owner Benson and Field Coordinator Holler at a jobsite. He did, received a job offer, and reported to work on July 10, 1995. (Tr. 225.)

---

[25] Part of the General Counsel's brief might be read to suggest that in terms of safety, an ungrounded 277-volt fixture doesn't pose the danger Respondent asserts. I will not interpret the General Counsel's brief as arguing that 277-volt electricity poses no significant danger.

Thus, the General Counsel's own witness, Douglas Summers, gave testimony, which described rather graphically some of the less fatal hazards of electricity at 277 volts. Summers, an experienced electrician. explained that he worked particularly slowly when a 277-volt fixture remained connected with electric power: "I would take the most time out on [fixtures with the power on] to keep, you know, from getting myself electrocuted by a 277 voltage because it hurts . . . when you get hit with 277 you can see little silver gnats in front of your eyes for about two or three days." (Tr. 322.)

Benson's testimony indicates that when he hired Kimball, he had great expectations that this new employee would solve some of the productivity problem. (Tr. 417.) Therefore, Benson put Kimball in charge of the work at the Cracker Barrel jobsite.

According to Kimball, on July 18, 1995, Holler told him they were shorthanded and asked him to work overtime, but Kimball declined. That evening, he spoke by telephone with Union Business Manager Maurice and with fellow employee Jones. Kimball testified "[W]e decided that due to the conditions, the shorthandedness of personnel and all, and their refusal to hire some of the Brothers out of the Local, that we would go on strike." (Tr. 226–227.)

The next day, wearing an IBEW cap, Kimball turned in his timecard to Holler. Kimball testified he told Holler "that we were going out on an unfair labor practice strike, that if he had any questions, please contact my Business Manager, Gary Maurice, and that I thought that he more than likely had the phone number." (Tr. 227, 274–275.) Kimball said it was the first time he had worn any union insignia while working for the Respondent.

Kimball testified that he picketed the Hamricks' jobsite for 3-1/2 to 4 hours on July 19, 1995.[26] The record indicates that Kimball did not picket the Company after this date.

On cross-examination, Kimball stated that the night before he went on strike, Union Business Manager Maurice had told him about a job with another company, which paid a higher wage rate than the Respondent did. Immediately after July 19, 1995, Kimball did go to work for this other employer. He testified that this job lasted about a month. (Tr. 275.)

Benson testified that Kimball was never replaced after he left. (Tr. 427.) Kimball made an unconditional offer to return to work, in a letter to Respondent from the union business manager, on November 10, 1995. (Tr. 228; GC Exh. 5.) Respondent did not reinstate Kimball. Benson testified:

> Well, he just really did not want to work. Didn't want to work a full day. I had gotten, you know, a few light fixtures, six (6) or seven (7) light fixtures per day were installed, just a total lack of concern for the completion of the job. I'd go out there, you know, to help out and try to get things rolling and it's like they didn't care. They just didn't care whether the job got finished or not. [Tr. 417–418.]

Benson further explained why he considered that Kimball in particular had a production problem: "Well, I saw—John Kimball was working on the left hand side of the store, in the dressing room area, and I believe there were probably twelve . . . or fourteen . . . or so light fixtures in those dressing room areas. I believe it took them three . . . days to do that, which is just entirely too long." (Tr. 437.)

Benson also testified that he had heard a report "from the field [that] there was a real high degree smell of alcohol and Dentyne gum on his breath in mid-afternoon." (Tr. 438.) He expressed a concern that Kimball might be drinking at lunch and return impaired, creating a safety hazard. (Tr. 439.)

(4) Douglas Hill

Douglas Hill testified that some time on or before June 2, 1995, he applied for work with Respondent, omitting from his application the names of contractors having bargaining relationships with the Union.[27] Hill testified that he received a call from Owner Benson on June 7, 1995. According to Hill, Benson offered him a job, after mentioning, in effect, that Hill had received a good reference from a former employer. (Tr. 196.)

The record suggests that Hill continued to work for Respondent throughout June. However, on July 4, 1995, Hill did not report for work. Benson called him.

Hill testified that Benson asked him if he planned to report to work and Hill replied no, that it was a holiday and he hadn't planned on working. According to Hill, Benson said, "I just don't see how we can use you anymore." (Tr. 197.)

Sometime around July 15, 1995, Respondent rehired Hill, who returned to the same jobsite at which he had worked before. (Tr. 198.) While working there, Hill said, he had spoken with a helper about the benefits of membership in the Union, with its apprenticeship program. Hill encouraged the Helper, John Overstreet, to contact Business Manager Maurice. On about July 17, 1995, Overstreet decided to quit.

Hill then telephoned Benson to advise him about Overstreet's resignation. Hill gave the following testimony about his conversation with Benson:

> I informed him that Johnny had quit and why he had quit and he wanted to know where he was going. I kind of hem-hauled around, you know, because I just didn't want to just come out with it and he asked me again where did he go to work and I told him he went to join the Union to make more money.
>
> . . . .
>
> During the phone call when I told Mr. Benson that Johnny had quit he raised some concerns as to why and to where and I told him, you know. He said he couldn't understand what was going on. He made references to being targeted by the Union and I said well, I don't know anything about that, you know, and he asked me again about Johnny. I said well, he has quit and I said I'm going to need some help. [Tr. 200–201.]

[26] There is some disagreement as to the duration of the picketing on July 19, 1995. Unlike Kimball, Jones testified that he picketed an hour or two. (Tr. 164.) Douglas Hill, who saw this picketing but did not participate in it, estimated that it lasted 30 minutes. (Tr. 201–202.) Maurice testified that he, Jones, and Kimball maintained the picket line for 30 to 45 minutes and then moved it to another jobsite, the Hannaford supermarket jobsite. (Tr. 88.) However, Maurice described the Hannaford jobsite as "just across the way" so it is possible that Kimball and Jones aggregated the amount of time they spent at each location in describing how long they picketed.

[27] As discussed above, Business Manager Maurice described the beginning of the Union's "salting" campaign, testifying that on June 6, 1995, he spoke with Douglas Hill and Douglas Summers and suggested they apply for work with the Company. (Tr. 76–77.) Hill's testimony places this discussion somewhat earlier, before June 2. However, it appears clear that Hill received and accepted the Respondent's job offer on June 7, 1995.

As discussed above, Jones and Kimball picketed on July 19, 1995. Hill testified that when he noticed the pickets, he telephoned Respondent's office manager, Dave Hill: "I told him that I was not on strike but they had set up a picket line out in front of Victoria Secrets there at the Mall and I would not cross that line." (Tr. 201.) Douglas Hill further testified that the office manager told him "it's going on all around" and that he should "just wait it out" which Hill did. (Tr. 201.)

According to Hill, the next 2 days after this picketing, he worked alone at the jobsite. He asked Benson for more help, but, Hill testified, Benson replied that he could not send anyone out.

Hill did not specify the date, but at some point, he said, he decided to go on strike. He testified as follows:

> I expressed, you know, to Mr. Benson that due to the working conditions and the hiring circumstances that I was going on strike.
>
> Q. What did Mr. Benson say to you?
>
> A. At that time to the best of my memory he said okay, and that was about the—of the conversation. Well, he asked me what was going on and I told him he needed—for any particulars he needed to talk to Mr. Gary Maurice.
>
> Q. Why did you say that to him?
>
> A. Because I felt that if he had questions that Mr. Maurice would be the one to answer it.
>
> Q. Had you discussed the possibility of striking with Mr. Maurice prior to the conversation?
>
> A. No, no.[28] [Tr. 203.]

The next day after informing the Company that he was going on strike, Hill reported to work at another job, which lasted about a month. He learned about this job from Union Business Manager Maurice. (Tr. 210.)

After it ended, Hill telephoned Benson on August 25, 1995. Hill testified that he told Benson, "I had ended my strike and that I was available for work." (Tr. 204.)

(5) Bobby Lee Barnett

Barnett testified that he became a journeyman electrician, through the Union, in April 1995. On July 7, 1995, he visited the Respondent's office to apply for work, obtained an application, and returned it 4 days later.

The Respondent hired Barnett, and he reported for work on July 12, 1995. (Tr. 344–345.) Barnett testified that he had to work more overtime than he desired. He urged the Company to hire additional workers, and became frustrated when that did not happen.[29]

Barnett testified that on July 31, 1995, he tried to find Owner Benson to renew his request for more help, but could not locate him. Then, he told Michael Willard, the job foreman, that he was not returning to work. Barnett testified that he said, "I'm going to join an existing unfair labor practice strike that has been initiated against Forsyth Electrical." (Tr. 355.)

Owner Benson, however, testified that Barnett quit,[30] a fact that Barnett flatly denied. (Tr. 371.) Foreman Willard provides the key to resolving this credibility conflict. He heard Barnett make both statements, but at different times.

Willard, who impressed me as a reliable witness, indicated that Barnett resigned on a Friday, probably July 28, 1995, when both Willard and Benson were present.[31] Significantly, Willard quoted Barnett as saying he was "too old to do this kind of work and he couldn't go no faster." (Tr. 507.) That statement fits with other testimony about Barnett's difficulty keeping up and his frustration on the job. Therefore, I credit Benson's testimony, corroborated by Willard, that Barnett resigned.

The following Monday, Barnett spoke with Willard when Benson wasn't around. Barnett said, "[H]e had joined the Union and their strike against Forsyth Electric." (Tr. 509.) However, I find that Barnett was no longer an employee at this time, because he had resigned the previous Friday.

(6) General conclusions about the strike

From all of the evidence about the strike, the central involvement of the union business manager emerges as a particularly compelling theme. The General Counsel's brief, quoted above, states that the "employees who struck were in contact with Business Manager Maurice and they relayed their concerns that Respondent needed more manpower." However, the record establishes that Maurice was much more than a sounding board for the employees' complaints. Maurice initiated and coordinated the "salting" activity to organize the Respondent's work force, and the strike clearly appears to have been part of his strategy and under his direction.

The record establishes that Maurice kept close track of what was happening at the Respondent's business. He had encouraged a number of men to apply for work at Forsyth Electrical. Moreover, Maurice suggested to some of these applicants that they take care not to disclose facts which would reveal their union affiliation.[32]

---

[28] Hill's testimony on cross-examination contradicts his statement that he did not talk with Maurice before going on strike:

> Q. When you called—when you decided to go on strike did you talk to Gary Maurice before you did that?
>
> A. That morning?
>
> Q. Yeah.
>
> A. Yes, sir.
>
> Q. Did you talk to him about going on strike?
>
> A. Yes, sir.
>
> Q. What did you tell him about it?
>
> A. I informed him of the situation that was there.
>
> Q. And what was that?
>
> A. That I was understaffed. [Tr. 207]

I credit Hill's testimony on cross–examination, and find that he did speak with Maurice before deciding to go "on strike."

[29] On the other hand, Benson testified that Barnett was unproductive. "He put in the hours," Benson said, "[B]ut he did very, very little work." (Tr. 443.)

Foreman Willard formed the opinion that Barnett could not even keep up with the helpers (Tr. 511.) and recommended to Benson that Barnett be discharged (Tr. 445.), a recommendation rendered moot by Barnett's resignation.

[30] Benson recalled Barnett's words of resignation as follows: "Fred, I'm too old for this stuff. I'm going to pick my tools up and put them in the truck, I quit." (Tr. 446.)

[31] Willard testified that it was a Friday at the end of July, and thought the date was the 26th. However, the last Friday in July 1995 was July 28.

[32] For example, John Kimball testified that the union business manager told him about the job at Forsyth Electrical and "indicated that I should

Once hired, such a "covert salt" was in a position to keep the Union informed about events at Respondent's business. For example, after Douglas Summers obtained a job at Forsyth Electrical, he provided the Union what might aptly be called a stream of intelligence.

On cross-examination, Summers testified that he wore a pager and that the union business manager sometimes contacted him that way. However, Summers added, the pager was not necessary:

> A. I didn't have to [wear the pager] because I was in constant contact with Gary [Maurice] because I was calling Gary and relaying everything that Fred [Benson] relayed to me, I relayed to Gary.
>
> Q. How many times —
>
> A. And, let me tell you something, he [Benson] wouldn't be left the job good enough before I got on the telephone and called Gary and let him know what was going on, what was said to me, and what was what.
>
> Q. How many times a day did you call him?
>
> A. Well, it all depends on how many times Fred [Benson] came by the job and spoke with me, or how many times he might have paged me up and told me something about getting manpower or something out there on the job. Ask Fred.
>
> Q. So, the only time you ever called Gary was after you talked to Fred?
>
> A. Yes, to report in on exactly what was done because, you know, that's the way I work with Gary to let him know exactly what's going on. [Tr. 338–339.][33]

In addition to keeping his finger figuratively on the pulse of events at Forsyth Electrical, Maurice clearly directed the "salts" in their organizing activity. For example, Ray Singleton, the first person to engage in a work stoppage, did so after receiving a call from Business Manager Maurice. The same day Singleton went "on strike," he reported for work for another contractor at a higher pay rate. (Tr. 266.) Although Singleton learned about this job from Maurice, he denied that Maurice told him about this job before he went "on strike." However, the timing is suspicious.

Another sign of the union business manager's involvement is the statement made by Singleton when he told Benson he was "going on an unfair labor practice strike." Singleton testified he told Benson "you have to get in contact with Gary Maurice and gave him the number." (Tr. 254.)

Two things about that statement appear significant. The first is Singleton's wording, "you *have to* get in contact with Gary Maurice." (Tr. 254; emphasis added.) The obligatory tone of that message sounds somewhat unnatural if the words are intended as helpful hint. Instead, the phrasing suggests that compelling Benson to contact Maurice was part of the Union's strategy.

Second, all five strikers used very similar words, so similar as to suggest a common origin even though spoken to Benson at different times. Thus, David Jones testified that on July 19, 1995, "I told Mr. Benson . . . I was going on strike and if he needed more information to call the Hall and speak with Gary [Maurice]." (Tr. 161.)

Likewise, Hill testified that he told Benson that "for any particulars he needed to talk to Mr. Gary Maurice." (Tr. 203.) Kimball also told Benson to contact Maurice. (Tr. 227, 274–275.)

The "call Mr. Maurice" statement obviously suggests the union business manager's active role in the work stoppages. So does other evidence. The employees' contacts with Maurice before ceasing work, and the business manager's ability to refer some to other jobs without an intervening delay, suggest that Maurice did more than compose the score which his players would follow. Rather, he was as much in control of the tempo and dynamics as a symphony conductor.

No witness admitted a deliberate attempt to slow the Respondent's progress in completing jobs. However, from the entire record, I infer that the Union's strategy included creating the need for Respondent to hire more workers, a need it might then satisfy by referring its members once Benson decided to do as he was told and call Maurice. The Union would create this demand by having the employees it had already "salted" into the Company work slowly and unproductively.

One of the two original "salts," Douglas Summers, volunteered on the witness stand that at one location, "We wouldn't maybe got about 10 or 15 lights [installed] in a day because I wouldn't put myself in no strain . . . . " (Tr. 325.) Summers implied that his pace arose from his concern about getting hurt on the job, but that explanation did not have the ring of truth, and even his need to explain his speed suggests that Summers was aware it was a problem.

Douglas Hill, another of the two original "salts," also worked with distinguishing slowness. When Foreman Ralph Holler Jr. was asked about Hill's speed on the job, Holler replied, "[T]here was no speed in his work period. Very slow with everything he did. Even his movement in walking around the job." (Tr. 535.)[34]

It is difficult to avoid the inference, which I draw, that the union business manager orchestrated the activities of these employees, including the speed at which they worked, to create a crescendo of pressure on the Company, with the crescendo reaching its peak from July 14 to 24, 1995. During this 10-day period, Kimball, Jones, and Hill announced they were going

---

forego any of my union affiliation in filling out the contract." (Tr. 222.) Additionally, at Maurice's suggestion, Kimball removed union stickers from his truck the night before driving it to Forsyth Electric. (Tr. 224.)

Maurice testified that he stressed that job applicants are "never to falsify the experience that they have and their ability but they might not reveal their known union employers as references." (Tr. 75.)

[33] Summers also testified that "at the close of every day, I filled in Gary or–in every single thing that went on the job." (Tr. 318.)

[34] It may be incorrect, however, to attribute Hill's slow pace entirely to an objective of forcing the Company to hire more workers, and therefore use the Union's referral services. Thus, Hill testify that "my attitude was pretty bad at that time. I had some family problems going on and my work attitude was really bad . . . ." (Tr. 199) Hill also acknowledged that drinking had affected his work. (Tr. 203.)

"on strike" and ceased work.[35] In each case, the individual discussed it with Maurice first.

Additionally, Maurice offered another employee, Douglas Summers, the chance to spend a week in Chicago with the Union paying his expenses and compensating him for the wages he would forego. That action resulted in Summers being unavailable for work during this same period, July 14 to 24, 1995.

Based on the record as a whole, I find that the idea of striking originated with Business Manager Maurice, and that he controlled its timing. I reject as disingenuous, and contrary to the weight of evidence, Maurice's testimony that he did not endorse or ratify the strike but just gave some guidance when he saw that was "where the employees want to go." (Tr. 150.)

Such a statement would be more credible if these individuals already had been working for Respondent and then decided to contact the Union in dissatisfaction. In such a case, the union official would simply be giving advice to help the employees achieve the goal for which they sought out the Union's help.

However, in this case, these particular employees went to work for the Company as part of the "salting" effort initiated by Maurice. At the very start, they had gone where Maurice wanted them to be. He cannot credibly claim merely to have been their follower when the evidence clearly shows that he was their leader.

The central control exercised by the union business manager also supports a finding that the five persons who claimed to go on strike did so for a common purpose, notwithstanding the separate reasons they gave. Based on the entire record, I find that the Union sought to cause the Respondent to recognize it and hire the people the Union referred, and that this objective caused the strike.

To some extent, my finding that the strike was recognitional at its core is consistent with one of the General Counsel's arguments. As noted above, in his post-hearing brief, the General Counsel stated: "The causal nexus between the strike and Respondent's unfair labor practices is clear. The employees who struck were in contact with Business Manager Maurice and they relayed their concerns that Respondent needed more manpower." (GCs Br. at 36.)

Those sentences standing alone, and out of context, might suggest that the General Counsel is contending that Respondent had some sort of duty to keep its manpower at a certain level and to obtain employees from the Union if needed to maintain that level. The General Counsel's argument, however, is much more subtle.

The General Counsel does not assert that the Respondent violated the Act by using fewer employees than someone might consider appropriate. Rather, the General Counsel seems to argue that the claimed shortage of workers was merely a symptom of the actual unfair labor practice, which was Respondent's refusing to consider job applicants because of their union affiliation.

In the General Counsel's view, Respondent's refusal to consider proUnion workers made it necessary for the existing employees to work overtime, prompting them to strike. Their protest concerned Respondent's discrimination against job applicants with union affiliations, which was an unfair labor practice, as well as the effects of that discrimination on their workday.

It is necessary for the General Counsel's theory to include the element that the strikers actually were protesting Respondent's alleged failure to consider the job applications of union adherents, rather than merely protesting a shortage of employees. Without that element, the strike either arose to protest working conditions, which would make it an economic strike rather than an unfair labor practice strike, or else the strike was to pressure the Respondent to deal with the Union, which would make it recognitional, rather than an unfair labor practice strike.

However, the truth is not as subtle as the General Counsel's theory. The strikers were "salts," sent by the Union to organize the Company's workers. They went forth from Business Manager Maurice on a mission. In fact, Maurice defined "salting" as "the act of going to work for nonUnion employers *for the purpose of organizing*." (Tr. 74; emphasis added.) I find that they went on strike for precisely this recognitional objective.

However, even assuming for analysis that they went on strike to protest being overworked, which I find not to be the case, and even assuming they went on strike to pressure the Respondent to hire employees from any source, and not just through the Union's hiring hall, those objectives are to protest working conditions, not unfair labor practices.

The complaint did not allege that the Respondent's decision not to hire workers at a particular time violated the Act. Additionally, the General Counsel does not argue that a refusal to hire workers at all constitutes an unfair labor practice. To the contrary, the General Counsel's brief acknowledged that one element the General Counsel must prove to establish a "refusal to consider" violation, is that the company either was hiring or had concrete plans to hire at that time.

So, even if the employees had gone on strike because of "concerns that Respondent needed more manpower," in the General Counsel's words, or "due to the working conditions and the hiring circumstances" as Hill put it, that "hire more people" objective did not involve protesting any unfair labor practice.

In addition to protesting working conditions and "the shorthandedness of personnel," Kimball described the additional objective of protesting the Respondent's "refusal to hire some of the Brothers out of the Local . . . ." However, the only complaint allegation concerning a refusal to hire involved Christopher Hill, and I have found that the Respondent did not violate the Act in that respect.

The complaint does allege that Respondent unlawfully refused to consider certain applicants for hire. However, I do not find that any such instances either wholly or partly motivated employees to go on strike or stay on strike. To the contrary, I find that Kimball's testimony that he spoke with Maurice and then decided to go on strike to protest Respondent's "refusal to hire some of the Brothers out of the Local" discloses solely a recognitional objective consistent with the aim of the "salting" strategy.

[35] The Complaint alleges that Hill went on strike on July 24, 1995, which is the same day Summers returned from 10 days off and reported for work.

To the extent that the General Counsel's brief asserts that there were other unalleged unfair labor practices which prolonged the strike, I reject that argument. In sum, I do not find that the strike was either caused or prolonged by unfair labor practices.

H. Alleged Discharge of Douglas Summers

Complaint paragraph 8 alleges that on or about July 24, 1995, the Respondent discharged Douglas Summers and thereafter failed and refused to reinstate him. As described above, Summers began work for the Respondent on about June 7, 1995, at the very start of the Union's "salting" campaign, and did not disclose his union affiliation when he applied.

Summers engaged in extensive union activity. His testimony, quoted above, establishes that every workday, Summers called the union business manager to report on conditions at the Respondent.

The record also establishes that Respondent knew about Summers' union sympathies and activities. On occasion, Summers had worn a union T-shirt, which may have been noticed by management, but in early July 1995, Summers brought his union affiliation to the Respondent's attention in a more dramatic way.

Summers testified that in early July 1995, he had a conversation with a representative of the general contractor on the project where Summers was working. He identified this representative of the general contractor as "James," or simply as the "general contractor."

According to Summers, James complained about the progress of the electrical work and attributed the slow pace to a lack of workers. Summers testified that he handed the general contractor's representative the card of Union Business Manager Maurice, and said, "[W]ell, hell, if you want somebody to supply enough manpower or get contractors in there, I said give Gary [Maurice] a call. I said he'd be more than glad to sit down and talk with you about this, you know, if Fred don't want to do it himself." [Tr. 311.]

Summers testified that he gave Maurice's card to the general contractor in the morning, and the afternoon of that same day, Benson visited the site and asked him about it. He described the encounter as follows:

> Fred . . . came up to me and said what you mean by telling the general contractor that I need union labor on this job. I said no, if he needed qualified people on the job to get the job done in a timely fashion, to give Gary a call, I never said that you needed union labor, but if you want to sign about getting an agreement, whatever, I'm not the person to talk to, talk to Gary. And, then the conversation ended like that, and we went on to stuff pertaining to the job. [Tr. 312.]

The complaint does not allege that Benson violated the Act by asking the question Summers attributes to him. However, this evidence clearly establishes that management knew about Summers' union sympathies.

Around or shortly before July 14, 1995, Union Business Manager Maurice offered Summers the chance to attend a one–week course on union organizing in Chicago, which Summers accepted. The Union paid Summers' expenses and also made up the amount he lost in wages because he did not work.

To get off work, Summers told Owner Benson that he had an "emergency." After Summers assured Benson that another employee could handle the work, Benson allowed Summers to be absent. Summers was gone more than a week, from July 14 to 24, 1995. (Tr. 308.)

After the course ended, he sought to return to work. Summers testified that he went to the Respondent's office between 7 and 7:15 a.m. on July 24, 1995. Owner Benson had not arrived, but Field Coordinator Holler was there, and told Summers to wait until Benson arrived. After Holler gave out work assignments, he and Summers sat and talked. Summers testified that Holler "[T]old me, he said your buddies went on strike. I said my buddies went on strike, I said who, and he told me David and John Kimball like that. I said okay, no problem. And that was the end of that conversation right there." (Tr. 309.)

After his conversation with Holler, Summers spoke with Owner Benson, who had arrived. Summers testified that Benson said, "[T]hings have caught up here and we won't be needing you no more."

Summers testified he asked if anything was wrong with his work, and that Benson replied, "[N]o, that was fine and everything, you did a good job, but I guess that don't need you no more. He said everything's caught up." (Tr. 310.)

Benson testified that he did not discharge Summers upon his return on July 24, 1995. Rather, Benson said, he laid Summers off because the Hamrick's job was substantially completed, and there was no other work for Summers to do. (Tr. 430–431.)[36] However, Benson also testified that he would not have considered Summers for work on any other project because Summers was unproductive. (Tr. 434.)

There is no difference between a layoff without possibility of recall and a discharge. I find that Respondent discharged Summers on July 24, 1995.

Other Evidence of Animus

Apart from the allegations in the complaint, the General Counsel sought to adduce evidence that Foreman Michael Willard had stated that the Respondent was not going to hire union workers. For this statement to bind Respondent, however, it would also be necessary to establish that Willard was a statutory supervisor or agent of Respondent.

Therefore, during the hearing, the General Counsel moved to amend the complaint to allege that Michael Willard was a supervisor of Respondent, and its agent. Initially, I denied the motion but later, after Respondent called Willard to testify, the General Counsel renewed the motion and I allowed the amendment over the Respondent's objection. Respondent denied that Willard was its supervisor and agent.

Willard described himself as the "lead mechanic" on a particular job. (Tr. 504.) His personnel file lists Willard as a "me-

[36] I credit Benson's testimony. It appears likely that the work at this jobsite was substantially completed by July 24, 1995, due to the evening and weekend work of Benson, Field Coordinator Holler, and Office Manager Hill. According to Benson, on one Saturday, these three, along with two helpers, installed 300 light fixtures. (Tr. 419.)

chanic" and Willard described himself as a "lead mechanic" rather than a foreman.[37] On direct examination, Willard also testified that he recommended to Owner Benson that Barnett be discharged, and that Barnett quit on the same day. (Tr. 506–507.)

Willard only recommended the discharge of Barnett on this one occasion, and because Barnett resigned, it is not possible to determine whether that recommendation otherwise would have been effective. Willard's testimony indicates that Benson was reluctant to discharge anyone because of a manpower shortage (Tr. 514), so it is not certain whether or not Willard's recommendation would have prevailed.

However, Willard also testified that he assigned work to employees and if necessary told them how to do it. He also testified that on one occasion, he recommended an individual for hire, and that person was hired. (Tr. 510–511, 516–517.)

Willard's testimony clearly established that he exercised authority to direct employees in their work, and that he used his independent judgment in doing so.[38]

Additionally, the evidence establishes that he evaluated employees' work performance. I find that at all times material to the Complaint, Willard was a supervisor within the meaning of Section 2(11) of the Act.

According to Bobby Lee Barnett, during a work break on July 18, 1995, he, a helper named "Doug" (last name unknown), John Anderson, and Willard were talking and Barnett mentioned that he had not been in North Carolina very long. Barnett testified that someone asked him where he was from originally, and after he responded, "[S]uddenly Mike [Willard] said you're not Union are you." (Tr. 348.) Although Willard testified, no one asked him whether he asked this question, which the General Counsel does not allege to be a violation.

The General Counsel does contend that Willard's testimony provides evidence of antiunion animus. In particular, the General Counsel seeks to establish through Willard that Respondent desperately needed to hire more workers, but did not, because the only skilled workers available had ties with the Union.

Thus, the General Counsel points to the testimony of employee Bobby Lee Barnett that on July 20, employee Anderson asked Willard why the Company did not hire more employees, and that Willard replied, "There's nobody to hire except Union and we're not hiring Union." (Tr. 352.)[39]

Willard testified that he did not recall whether or not he made such a statement to Barnett. However, he did state that there was a manpower shortage at his particular jobsite, and that he had talked to Benson about transferring workers in from other jobsites. (Tr. 514–515.)

Willard did not testify that he heard from Benson that the Company was not hiring employees with union ties. However, on cross-examination, he acknowledge knowing that to be the case:

> Q. In fact, you knew that's why you were short of help, because they weren't going to hire any union labor . . . . Isn't that true?
>
> A. Yes. [Tr. 515.]

Willard impressed me as a reliable witness, and I credit his testimony that he "knew" the Respondent was not going to hire union labor. However, Willard is a first-line supervisor without authority to affect the Respondent's hiring policies. The one time he recommended that a person be hired, management followed that recommendation, but that fact does not establish that Willard was responsible for the decision or had any say in establishing the Respondent's overall hiring policies.

Moreover, there is no evidence that Willard's "knowledge" that the Company would not hire union labor came from any statement of a management official. To the contrary, Willard specifically denied that Benson told him that the Company could not hire anyone because of the problem with the Union. (Tr. 514.) There is no evidence that any other management official or supervisor made such a statement to Willard.

Since the record does not disclose the basis for Willard's "knowledge" of a policy not to hire employees with union affiliation, I must conclude that Willard gained such "knowledge" by inference from his analysis of two facts: He knew that the Company needed more manpower because he could not get workers transferred to his jobsite, and he also knew that the Union was engaged in a "salting" campaign.

In sum, I find that Willard held the sincere belief that the Company had a policy that individuals with union ties would not be hired, regardless of need, and that this belief is fully consistent with the facts which Willard knew. However, without more, I cannot generalize that this belief, of a first-line supervisor in the field, who did not make hiring decisions, was actually the policy promulgated by management or followed by those engaged in the hiring process.[40]

Indeed, evidence from a witness called by the General Counsel suggests that Respondent's higher management did not share Willard's opinion. John Kimball testified that the first day he reported to work, he noticed some employees wearing union T-shirts. He asked Field Coordinator Holler about it. Kimball testified that Holler "told me that . . . he was satisfied with their work, that since they were short handed, they were

[37] His current pay rate was $15.45, which was higher than all other "mechanics" except Alan Mather. (R. Exh. 18.)

[38] The Act defines "supervisor" to mean "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." See 29 U.S.C. § 152(11).

[39] Although the General Counsel called Anderson to testify, he did not ask Anderson about this incident. When Anderson testified, the General Counsel had not yet sought to amend the complaint to allege that Willard was a supervisor.

[40] In *Quality Control Electric*, 323 NLRB 238 (1997), the Board found that the statements of a project superintendent, informing applicants they would not be hired because of union affiliation, were attributable to the respondent. The Board rejected the defense that this superintendent had no involvement in the hiring decisions. In the present case, however, the evidence indicates that Willard was not involved in the hiring process. That fact, and Willard's status as a first-line supervisor rather than a project superintendent, lead me to conclude that the present case should be distinguished from *Quality Control Electric*.

going to work the guys but they had preferred to hire non–union personnel." (Tr. 226.)

Therefore, I do not find that Willard was describing management's policy for the Respondent when he made the statement in question.

I. The Respondent's Hiring Pattern

In deciding whether the Respondent failed to consider job applicants because of their union affiliation, I must determine whether it was hiring employees, or had concrete plans to hire employees, on the dates in question. The General Counsel makes several arguments that the evidence supports such a finding.

Payroll records indicate an increase in regular and overtime hours worked in the latter part of July 1995. Additionally, the General Counsel points to the fact that Owner Benson and two managers were doing electrical installation at jobsites on evenings and weekends.[41]

Although such evidence might establish that the Respondent had a need to hire workers or that it would be prudent to hire workers, it does not establish that the Company actually was hiring, or had plans to do so.

Additionally, in the unique circumstances of this case, I doubt that this evidence even demonstrates a need for more workers, as contrasted to a need for its existing workers to do the work as expected. A number of "covert salts" had taken jobs with the Respondent. The record establishes that these individuals were not producing, and I have inferred that their low productivity was part of the Union's strategy to put pressure on the Company to seek workers from the union hall. Therefore, an increase in overtime does not imply that the existing workforce needed augmentation.

Moreover, the evidence does not establish that Respondent decided to suspend its hiring process in latter July 1995 as a means of discriminating against applicants with union affiliation. Rather, the record establishes, and I find, that Respondent's managers were simply too busy doing the installation work which the employees at the jobsite had not done.[42]

Further, the existing hiring process had proven itself seriously flawed. For example, Benson had checked Kimball's job reference and heard that Kimball was a "great mechanic," yet when Kimball came to work, he was unproductive. It is natural, and nondiscriminatory, that the Respondent would choose to meet the deadline crisis by having its managers pitch in, knowing that any employee it hired at this critical moment might be undependable.

In sum, neither payroll records nor testimony about the employees being busy establishes that the Company actually was hiring workers or had concrete plans to do so in latter July 1995. I find that the Respondent was not hiring workers, and had no plans to do so, at that time. On the other hand, I find that the Respondent did resume hiring on August 1, 1995, and began excluding Union adherents from consideration at that time.

III. THE LEGAL PRINCIPLES

A. Alleged Instance of Interrogation

As discussed above, I did not credit Barnett's testimony that Owner Benson asked him about his union affiliation. Therefore, I recommend that complaint paragraph 7(a) be dismissed.

B. Alleged Refusal to Hire Christopher Hill

The General Counsel initially amended the Complaint to allege that Respondent refused to consider Christopher Hill for hire. However, a later amendment deleted this allegation and substituted an allegation that Respondent refused to hire Hill. Presumably, the General Counsel made this change because Respondent did offer Hill a job, and thus considered him for hire, although it rescinded the offer before Hill began work.

Without doubt, rescission of a job offer already extended constitutes an adverse employment action. I analyze its lawfulness by applying the framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Under this framework, the General Counsel may establish the prima facie case by proving the following four elements: (1) The alleged discriminatee engaged in union or protected, concerted activities. (2) The respondent knew about such activities. (3) The respondent took an adverse employment action against the alleged discriminatee. (4) There is a link, or nexus, between the protected activities and the adverse employment action.

Once the General Counsel has made its prima facie case, the burden shifts to Respondent to show that, in essence, that it would have taken the same action, for nondiscriminatory reasons, even in the absence of protected activity.

With respect to the first element of the *Wright Line* test, the only evidence indicating that Christopher Hill engaged in union or other protected activity was his testimony that his car had a union bumper sticker. I credit this testimony, and find that the display of a union bumper sticker is protected under the Act.

Second, the General Counsel must prove that Respondent knew about Hill's protected activity. To establish such knowledge, the General Counsel relies upon Christopher Hill's testimony that when he visited Forsyth Electric to apply for work, "a gentleman came out and asked if one of the two of us owned a brown Honda sitting out front, and I said yeah, it was mine, and he said could I move it, so I went out and moved it to the lower parking lot." (Tr. 278.)

The General Counsel argues that the man who asked Hill to move his car was the Respondent's office manager, Dave Hill, an acknowledged supervisor. Since this supervisor saw Christopher Hill's car, the General Counsel contends, he must have seen the bumper sticker too, which would give the Respondent knowledge of Hill's union affiliation.

Office Manager Hill did not testify, and thus the record does not establish that he noticed the union bumper sticker on Christopher Hill's car. Moreover, even assuming for the sake of

[41] Benson testified, "You know, we were all rather busy . . . in the evening Ralph and Dave and I would go work on one job . . . We went to so many jobs during that time period. In the morning I might be trenching over at Cracker Barrel and in the afternoon I might be putting in fixtures at Hamrick's, in the evenings I might be putting some pvc in the ground at Hannaford's or whatnot . . . ." (Tr. 493.)

[42] Thus, Benson testified, "I didn't have time to review [applications] or really to spend any time looking at them, I had to be out in the field working." (Tr. 452.)

analysis that Office Manager Hill did see the bumper sticker, there is no evidence that he mentioned it to Benson, who made the decision to rescind the offer of employment which he had extended.

The General Counsel seeks to avoid this problem of proof by arguing that because the Respondent did not call its office manager to the stand, I should draw an adverse inference and assume this supervisor would have given testimony establishing that Respondent knew about the union bumper sticker and, therefore, knew about Christopher Hill's union sympathies. In his brief the General Counsel states this argument as follows:

> The person who did see the sticker, admitted supervisor Office Manager Hill, did not testify and Respondent failed to provide a basis for failing to call him to testify. In these circumstances, the Judge should presume that Respondent failed to call him to testify because his testimony would have been adverse to Respondent's position. See *International Automated Machines*, 285 NLRB 1122, 1126 fn. 9 (1987), enforced mem. 861 F.2d 720 (6th Cir. 1988). [GC Br. at 21.]

First, it should be noted that the General Counsel's argument assumes a fact not in evidence. This fact appears closely related to, if not identical with, the fact the General Counsel seeks to prove by adverse inference.

Specifically, the General Counsel assumes that someone from Respondent's management saw the union sticker on Christopher Hill's car, and that this management official was Office Manager Dave Hill. Thus, the brief states, "The person who did see the sticker, admitted supervisor Office Manager Hill . . . ." However, the record does not disclose that *anyone* in Respondent's management saw the sticker. Indeed, the record doesn't even establish that a supervisor saw Christopher Hill's car, let alone the sticker on it.

Since I find the General Counsel's assumptions to be unwarranted, I believe it is important to mention this factual problem explicitly before going on to discuss the legal principles he invokes. Sound logic underlies the doctrine allowing an adverse inference to be drawn, in certain circumstances, when a party does not call a witness to testify. The infirmity here, in my opinion, resides not in the principle, but in the attempt to apply it to the wrong situation.

In *Martin Luther King, Sr., Nursing Center***,** 231 NLRB 15 (1977), the Board described the adverse inference principle as follows:

> In crediting the testimony of the General Counsel's witnesses, the Administrative Law Judge not only relied on the demeanor of the witnesses, but also implicitly relied on the "missing witness" rule which states that, "where relevant evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the [trier of fact] may draw an inference that such evidence would have been unfavorable to him." 29 Am.Jur. 2d § 178. See also *Avon Convalescent Center, Inc.*, 219 NLRB 1210 (1975); *Bricklayers Local Union No. 1 of Missouri, AFL–CIO (St. Louis Home Insulators, Inc.)*, 209 NLRB 1072 (1974). Inasmuch as the Respondent has offered no explanation as to why its supervisors did not testify at the hearing, we find the drawing of an adverse inference against the Respondent and the crediting of the General Counsel's witnesses was proper. [231 NLRB 15 fn. 1.]

The Board thus has established preconditions to drawing an adverse inference. These preconditions include (1) the party against whom the rule is invoked must have control of certain evidence; (2) the evidence in question must be "relevant evidence which would properly be part of a case;" (3) this party's interest would naturally be to produce the evidence; and (4) it did not offer a satisfactory explanation for failing to produce the evidence.

Here, the General Counsel contends that the Respondent should have called its supervisor, Office Manager Hill, to testify. Clearly, the Respondent had "control" of this evidence in the sense that it could call its own supervisor to testify with little difficulty. Of course, the General Counsel could also have required Hill's testimony, by subpoena, just as it required the Respondent to produce records.

Although the facts do satisfy the first requirement, in my opinion they do not meet the second, that the evidence in question be "relevant evidence which would properly be part of a case." The fact that *someone*, perhaps Office Manager Hill, asked Christopher Hill to move his car does not convincingly establish even that the office manager saw the car in question, let alone that he noticed the sticker on it. Just as easily, someone could have told the office manager that a car was in the way and needed to be moved. The record hardly demonstrates that Hill's testimony would be "relevant evidence which would properly be part of a case."

The third requirement is that it would naturally be in the interest of the party having control of the evidence to produce it. The record does not persuade me that it would naturally have been in the interest of Respondent to produce Office Manager Hill. Since no evidence established that he saw Hill's car, he had nothing to refute.

The final requirement, that a party failing to offer evidence or call a witness must provide a satisfactory explanation, can arise only after the other three elements have been met, producing an expectation that the evidence should have been offered or the witness should have been called. Here, no such expectation arises because at least two of the elements have not been satisfied.

Another reason I do not believe it appropriate to draw an adverse inference in this case concerns the possible interaction of the adverse inference rule with the manner in which the Board allocated the burdens of proof in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The Board issued its decision in *Martin Luther King, Sr., Nursing Center* about 3 years before it established the *Wright Line* framework which allocated the burdens of proof. Therefore, it is important to take care to apply the earlier policy in a way that does not undo the later.

If the adverse inference rule may be triggered by speculation or conjecture, rather than by the presentation of evidence on a given point, the General Counsel is excused from having to

establish each of the four requirements of a prima facie case with evidence rather than supposition. Such an expansive application would allow the General Counsel, having the burden of proving such an element to present no evidence, but later claim that the respondent should have pitched in and helped make the prosecution's case.

Finally, there is another independent reason why I decline to draw such an adverse inference. Apart from the fact that the evidence does not show that the man who asked about the brown Honda ever saw it, the record also does not establish to my satisfaction that this man was, in fact, Office Manager Hill.

The General Counsel's brief states that, during Christopher Hill's job interview, after Benson left to get the tax forms, "Office Manager Dave Hill came in and asked who owned the brown Honda that was parked in front of the building." The brief cites transcript pages 278–279 and 295–296. (GC Br. at 3–4.) However, the transcript reports at page 278 that when asked who the man was, Christopher Hill responded, "I'm not sure of his name, no, sir. I think it was Mr. Hill, Dave."

My review of the record did not disclose any other evidence which would identify the man who inquired about the Honda. Since the Company rescinded the offer of employment before Christopher Hill ever came to work, he did not have the opportunity to learn the names and faces of the Respondent's supervisors. Therefore, I must regard Christopher Hill's testimony that he thought the man was Dave Hill as resting, at least in part, on conjecture.

Since the evidence falls short of establishing the identity of this person, it would be a bit tenuous to draw an adverse inference from Respondent's failure to call him as a witness. Therefore, I will not draw such an adverse inference.

Considering the entire record, I find that the General Counsel has failed to establish that Respondent knew about Christopher Hill's union affiliation at the time Benson rescinded its offer to hire him. The record also does not establish that the Respondent knew about the Union's "salting" campaign at the time Benson decided not to hire Christopher Hill. Hill applied for work at Forsyth Electrical on the same day that, according to Business Manager Maurice, the Union began referring "salts" to apply for work there. It would be improbable for the Company to have learned about the Union's campaign so soon after it began, and there is no evidence to that effect.

I find that the General Counsel has not carried his burden of proving that the Respondent had knowledge of Christopher Hill's protected activities. Therefore, the General Counsel has failed to establish a prima facie case.

Although the *Wright Line* analysis stops at this point, in case the Board disagrees with my conclusion that the General Counsel did not establish the second element, I will discuss briefly the other two elements. The evidence clearly establishes the third element. Respondent's withdrawal of the job offer constitutes an adverse employment action.

However, I find that the General Counsel has not proven the fourth element, a link between Hill's protected activity and the adverse employment action. Demonstrating this link requires some evidence from which unlawful motivation may be inferred.

The complaint, as amended, alleges only one statement as an independent violation of Section 8(a)(1) of the Act, but that statement allegedly took place 11 days after Benson withdrew Hill's job offer. Moreover, I have found that this alleged instance did not take occur.

In other respects, the record does not provide a basis to conclude that animus against the Union motivated the withdrawal of the job offer. Therefore, I must find that the General Counsel has not proven this element.

I recommend that paragraph 9(b) of the complaint, as amended, be dismissed.

C. Framework for "Refusal to Consider" Allegations

The nature of a refusal to consider allegation affects how it will be analyzed. Such a refusal might either be classified as an "adverse employment action" or it could be considered merely a *potential* adverse employment action.

If a refusal to consider produces only the potential for an adverse employment action, it would be difficult to complete the *Wright Line* analysis. The third step of that process requires a determination of whether the alleged discriminatee has suffered an adverse employment action, not just the possibility of one.

The remedy for a refusal to consider violation may include an order to hire the discriminatee, but in some cases it may not. It depends on whether the employer, applying lawful criteria, would have hired the applicant if it had considered him. *Ultrasystems Western Constructors***,** 316 NLRB 1243 (1995). This variability might suggest that a refusal to consider alone, absent some additional factor, does not adversely affect employment status in a concrete way.

However, the Act does not speak of a refusal to consider, but more broadly prohibits "discrimination in regard to hire" which encourages or discourages membership in any labor organization. 29 U.S.C. § 158(a)(3); see also *Phelps Dodge Corp. v. Labor Board***,** 313 U.S. 177 (1940). It is instructive to think of a refusal to consider as "discrimination in regard to hire" accomplished at the earliest possible time.

Such discrimination shuts the door to employment just as effectively as a refusal to hire, but somewhat sooner. Thus, it produces a completed "adverse employment action" sufficient to satisfy the third requirement in the *Wright Line* analysis.

Although a refusal to consider constitutes an "adverse employment action" just as unequivocal as a discharge or a refusal to hire, it leaves fewer traces. Therefore, in practice, determining whether there has been the "adverse employment action" required by *Wright Line* can be problematic.

However, there is another formulation with which the refusal to consider allegation may be analyzed. In *Ultrasystems Western Constructors***,** above, the Board quoted, with apparent approval, the Fourth Circuit's statement[43] that such unlawful discrimination could be proven by establishing the following elements: (1) The employer is covered by the Act. (2) The employer at the time of the purportedly illegal conduct was hiring or had concrete plans to hire employees. (3) Antiunion animus

[43] *Ultrasystems Western Constructors, Inc. v. NLRB***,** 18 F.3d 251, 256 (4th Cir. 1994), citing, inter alia, *NLRB v. National Transportation Management Corp.*, 462 U.S. 393, 401 (1983).

contributed to the decision not to consider, interview, or hire an applicant. (4) The applicant was a *bona fide* applicant.

The Board later affirmed a judge's decision using this same test in *The 3E Co.*, 322 NLRB 1058 (1997). Therefore, this analytical framework appears to be an expression of Board policy which may be applied generally, rather than merely the rule applied on remand in the *Ultrasystems* case. I will follow it here.

Two of the four elements of the *Ultrasystems* test may warrant discussion. I interpret the second element as requiring the General Counsel to prove that Respondent actually was hiring or planning to hire, not merely that it needed to hire. There is a difference between an employer's refusal to create a job opening in favor of working its existing employees overtime, and an employer seeking to fill a job opening but refusing to consider certain applicants because of their union ties.

Conceivably, the General Counsel could allege that an employer refused to consider particular applicants for hire by refusing to consider all applicants for hire. However, the Complaint does not expressly allege such a theory and the General Counsel does not argue it.

With respect to the fourth element, although the requirement that the General Counsel prove that an applicant was bona fide arguably might suggest that the General Counsel had the burden of establishing that the applicant could do the job, the Board has drawn a distinction between the good faith of the applicant, which is part of the General Counsel's prima facie case, and the applicant's ability to do the job, which is not. *Ultrasystems Western Constructors*, 316 NLRB at 1244.

D. Alleged Refusal to Consider Phillip Wheeler for Hire

As stated above, Phillip Wheeler filed a job application with the respondent on July 17, 1995. Respondent has not offered him employment. At the outset, I find that the General Counsel has proven the first element of the *Ultrasystems* test. The Respondent is an employer within the meaning of the Act.

To satisfy the second element, the General Counsel must prove that at the time of the purportedly illegal conduct, the Respondent either was hiring employees or had concrete plans to hire employees. The evidence does not establish that the Respondent was hiring employees at the time Wheeler applied on July 17, 1995. It had been hiring employees earlier that month, but the performance of those employees had thrown management into a state of bewilderment and confusion.

For example, it had hired employee John Kimball on July 10, 1995. As discussed above, the Respondent had checked one of Kimball's references and received the report he was a great mechanic. However, Kimball's work product proved to be very unsatisfactory.

The Kimball situation illustrated vividly for Respondent that its traditional means of verifying that a worker would be productive, by checking references, had broken down. In this unusual situation, it was perfectly reasonable for Respondent to cease hiring for the time being.

In sum, I find the evidence insufficient to establish that in deciding not to hire any more employees, the Respondent sought to avoid hiring employees with union affiliations or sympathies. Rather, it sought to avoid hiring more employees who would not produce.

Moreover, pressed by deadlines, Respondent could ill afford to spend more time interviewing applicants and checking references which, the Kimball experience showed, might be unreliable. Instead, Respondent's owner and other managers worked at the jobsites evenings and weekends to overcome the productivity problems and meet the Company's contractual obligations.

For these reasons, when the man with whom Wheeler spoke told him, "We're not hiring," that statement was quite literally true. Therefore, the General Counsel has failed to prove the second *Ultrasystems* requirement, that the Respondent was then hiring or had concrete plans to do so.[44] I conclude that the General Counsel has not proven that the Respondent violated the Act by refusing to consider Wheeler for hire on July 17, 1995.

However, the complaint not only alleges that Respondent failed and refused to consider Wheeler for hire on July 17, 1995, but that it has continued to do so.

The Respondent began hiring workers again on August 1, 1995. Its willingness to hire Jimmy Brewer, whom it considered a bad employee, but not any of the applicants with known union ties, establishes that antiunion animus had developed. Significantly, Respondent did not offer any cogent explanation of why it would rehire a bad employee but not hire applicants with union ties. Animus may be inferred from suspicious circumstances. See, e.g., *Casey Electric*, 313 NLRB 774 (1994). I do so here.

Because of this animus, beginning August 1, 1995, Respondent took applicants with known union affiliation out of consideration for employment. I find that the General Counsel has satisfied the third step of the *Ultrasystems* analysis for this period.

At the fourth step, Wheeler clearly worked in the industry and was seeking employment. I find that he was a bona fide job applicant. See, e.g., *Blaylock Electric*, 319 NLRB 928 fn. 1 (1995); *Windemuller Electric,* 306 NLRB 664 (1992). Therefore the General Counsel has proven that the Respondent failed and refused to consider Wheeler for hire, in violation of Section 8(a)(3) and (1), beginning on or about August 1, 1995, and continuing at least through the date of hearing.

E. Alleged Refusal to Consider Gregory Davis for Hire

I find that Davis was a bona fide job applicant. I do not find that the Respondent refused to consider him for hire on July 20, 1995, when Davis applied for work. As discussed above, Respondent was not hiring at that time.

However, and for the same reasons applicable to Phillip Wheeler, I do find that beginning August 1, 1995, Respondent failed and refused to consider Davis for hire, because of animus against the Union. I find that this refusal to consider Davis for hire violated Section 8(a)(3) and (1), and continued at least through the date of hearing.

[44] Analyzed in *Wright Line* terms, the General Counsel has failed to establish the third element of a prima facie case. There was no adverse employment action at this point because the Respondent was not hiring anyone and therefore took no employment action at all.

F. Alleged Refusal to Consider Gary Maurice for Hire

Complaint paragraph 9(a) alleges that the Company failed and refused to consider Gary Maurice for hire on July 21, 1995 and has continued to fail and refuse to consider him for hire. After the record closed, the General Counsel included in his posthearing brief a motion to amend this complaint paragraph to allege that the refusal to consider violation began on July 13, instead of July 21, 1995. This motion, opposed by Respondent, must be considered before proceeding to the complaint allegation itself.

1. The General Counsel's motion

The General Counsel's brief explained the General Counsel's posthearing motion to amend as coming about "because Respondent introduced evidence that it does not require employment applications and that it actually hired most of its employees without applications." (GCs Br. at p. 28.)[45]

However, the General Counsel's brief suggests that seeking this amendment involves more than a reaction to evidence about employment applications. It appears that the requested amendment also seeks to counter one of Respondent's defenses, that it did not have a duty to hire Union Business Manager Maurice because the Union was engaged in a strike against Respondent when Maurice submitted his employment application to Forsyth Electrical on July 21, 1995. Thus, the General Counsel's brief states:

> Respondent further argues that it should not have to consider [Union Business Manager Gary] Maurice for employment because he was actively participating in a strike against Respondent at the time of his application. See *Sunland Construction Company*, 309 NLRB 1224, 1230–1231 (1992). While it may be true that Maurice was involved with a strike at the time he made a formal application for employment he was not involved in a strike on July 13 when he made an oral application for employment. [GC Br. 27.]

In some circumstances, the Board may allow the General Counsel to amend the complaint at a later date, if the issue raised by the amendment has been "fully litigated." Here, the General Counsel invokes this principle, claiming that the "matter has been fully litigated mostly through evidence introduced by Respondent and the amendment merely conforms the complaint to the evidence." See *Pincus Elevator & Electric Co.*, 308 NLRB 684, 684–685 (1992), enfd. mem. 998 F.2d 1004 (3d Cir. 1993). (GC Br. 28)

The term "fully litigated" clearly pertains to the due process concept that the Respondent is entitled to notice of the allegations against it and an opportunity to present its evidence and arguments concerning those allegations on the record. If an allegation has been "fully litigated," the Respondent necessarily has been placed on notice and given the opportunity to address the allegation with argument and proof.

Determining whether an issue has been "fully litigated" therefore requires inquiry into what notice the Respondent has received and what opportunity it has had to meet the issues raised. The question of notice will be considered first.

The original charge in Case 11–CA–16631, filed July 24, 1995, alleges in part that the Respondent, "beginning on or about 7/27/95, changed [its] hiring practices in an effort to refuse employment to the below-listed individuals because of the[ir] membership in the Union . . . Gary Maurice—7/21/95." (GC Exh. 1a.) A charge is not a pleading, but its language is the starting point in determining what notice the Respondent received that it might have to defend against a particular allegation. The charge language does not allege any refusal to consider Maurice before July 21, 1995.

The complaint is a pleading, and paragraph 9 of the original complaint alleges that Respondent "failed and refused to consider for hire, and continues to fail and refuse to consider for hire" Gary Maurice on July 21, 1995. (GC Exh. 1(d).) This complaint issued on November 28, 1995.

Two weeks later, the Union filed another charge against Respondent, in Case 11–CA–16805. This charge alleges that "*since 7/24/95*, the employer has refused, and continues to refuse to consider the below-named employees for hire because they have participated in . . . NLRB proceedings . . . Gary Maurice. . . ." (GC Exh. 1(h); emphasis added.)

Although the General Counsel has not proceeded against Respondent on one of the theories raised by the charge, namely, that Respondent violated Section 8(a)(4) of the Act by discriminating against employees because they participated in Board processes, the General Counsel did consolidate Case 11–CA–16805 with Case 11–CA–16631. The Order Consolidating cases, consolidated complaint and notice of hearing, issued on March 14, 1996. Paragraph 9 of the consolidated complaint alleges that Respondent failed and refused to consider Gary Maurice for hire on July 21, 1995. It does not allege a refusal to consider or hire Maurice on any earlier date. (GC Exh. 1(m).)

Before the hearing, the General Counsel amended the complaint, and specifically, paragraph 9 of the complaint, twice. (GC Exhs. 1(u) and 1(w).) Neither of these amendments changed the date on which Respondent allegedly began discriminating against Maurice.

Also before the hearing, the Respondent moved unsuccessfully for judgment on the pleadings, contending, among other things, that the complaint did not provide enough information for the Company to develop its defense. The General Counsel's opposition vigorously disagreed, stating, in part:

> The Complaint contains a clear and concise description of the acts which are claimed to constitute unfair labor practices as required by Section 102.15 of the Board's Rules . . . . The Complaint is sufficiently specific to apprise Respondent of the violations with which it is charged. [GC Exh. 1(t) at 3.]

Thus, before the hearing, the General Counsel took the position that the complaint meant what it said. I find that the Gen-

[45] Sec. 102.26 of the Board's Rules and Regulations provides, in part, that "All motions, rulings, and orders shall become a part of the record . . . ." In this instance, the General Counsel's motion appears within his brief to the administrative law judge, which is not a part of the record. See Sec. 102.45(b) of the Board's Rules and Regulations. However, I will treat the General Counsel's motion as properly filed and will decide it on its merits.

eral Counsel did not put the Respondent on notice, before the hearing opened, that it would have to defend against an allegation that it refused to consider Maurice for hire on July 13, 1995. The question remains, however, as to whether Respondent became aware of this fact during the trial itself.

My review of the record reveals no instance during the trial in which the General Counsel sought to amend the complaint to allege that Respondent had failed and refused to consider Maurice for employment beginning on some date other than July 21, 1995. I also do not find that notice of such an intent arose by inference from the way the General Counsel presented his case.

The General Counsel elicited testimony from Union Business Manager Maurice that on about July 13, 1995, he went to Forsyth Electrical and spoke with Field Coordinator Ralph Holler, an acknowledged supervisor. However, he did express some uncertainty as to the date, testifying, "I'm wanting to say it was a Thursday. I'm not set in concrete on that." (Tr. 78.)

Holler remembered the encounter with Maurice, but not the date. He testified that Maurice came in and wanted an application. "I told him that we're not hiring," Holler testified, "but if he wanted to take an application you're welcome to take one." (Tr. 564.)

Another witness called by Respondent, Alan Mather, corroborated Holler's testimony. Mather indicated that Maurice visited Forsyth Electrical and asked for a job application in July 1995, but was not more specific about the date. (Tr. 573.)

The General Counsel predictably would adduce testimony about this visit as background to explain where Maurice obtained the Forsyth Electrical application. The testimony might also be presented because the General Counsel argues that company officials made statements to the effect "we don't need any more help and so we aren't hiring" to support its theory that Respondent discriminated against union adherents, converting the strike into an unfair labor practice strike.[46]

Thus, the General Counsel had obvious reasons, consistent with the complaint and its theory of violation apparent at trial, to elicit testimony about Maurice's first visit to Forsyth Electrical. It would not be reasonable to require the Respondent to guess, from the General Counsel's presentation of evidence during the hearing, that a month after the record closed the General Counsel would try to use this same evidence to establish that Respondent violated the law on July 13, 1995.

To support its posthearing motion to amend the complaint, the General Counsel cites *Pincus Elevator & Electric Co.*, 308 NLRB 684 (1992). However, that case involved General Counsel attempting to amend the complaint during a hearing, and while the respondent retained the opportunity to present evidence contesting the new allegations. That situation is quite different from the General Counsel seeking to amend the complaint a month after the record closed.

Another case, not cited in the General Counsel's brief, comes closer factually to the present situation. In *Hankins Lumber Co.*, 316 NLRB 837 (1995), the complaint alleged discriminatory layoffs on October 22 and November 1, but did not specifically allege that an asserted October 19 layoff violated the Act. The judge found that the respondent acted from a discriminatory motive in causing the October 19 layoff and took into account this action as evidence of animus against the union, but did not find that the layoff violated the Act.[47]

In deciding that the October 19 layoff did not violate the Act, the judge relied upon the absence of any complaint allegation to that effect. Significantly, he also relied upon the explanation General Counsel gave at the hearing as to why the General Counsel wanted certain evidence in the record. Thus, both *Hankins Lumber Co.* and the present case touch on the question of how far the General Counsel may go in presenting evidence for one purpose at trial, and later relying upon that evidence for an unannounced purpose of establishing a violation not alleged in the complaint.

Understanding the Board's ruling in *Hankins Lumber Co.* requires some further discussion of what happened in that case at trial. In *Hankins*, the General Counsel tried to present evidence that on the day of a representation election, October 19, the respondent laid off about two dozen employees. The complaint did not allege that this action violated the Act in any way, but it appeared similar to allegations that other layoffs had constituted unlawful unilateral changes in violation of Section 8(a)(5) of the Act.

After Respondent objected, the General Counsel stated on the record that it was not seeking to present evidence about the October 19 layoff to establish a unilateral change, and, based upon that representation, the judge overruled the objection and allowed the testimony.

The General Counsel excepted to the judge's finding that no violation occurred on October 19. The General Counsel based this exception, not on a theory that the layoff constituted a unilateral change in violation of Section 8(a)(5), but that it unlawfully discriminated against employees in violation of Section 8(a)(3) of the Act.

Even though the complaint had not alleged that the layoff violated Section 8(a)(3), the Board found merit to the General Counsel's exception. The Board stated, in part, as follows:

> Although the General Counsel disclaimed a "change of past practice" theory, he did assert, at the hearing, that the temporary layoffs, including the October 19 layoffs, were unlawful. The complaint's allegation of unlawful layoffs on October 22 and November 1 gave the Respondent sufficient notice of a factual time frame reasonably encompassing October 19. Furthermore, the first temporary layoff is closely related to and raise the same issues as the two subsequent temporary layoffs. These issues were fully litigated as to all three layoffs. As set forth in the judge's decision, the Respondent designed each temporary

[46] For example, General Counsel's brief contends that Kimball was well aware that Respondent had an insufficient workforce and needed additional help, but was not even allowing known union applicants to fill out an application. After conferring with Business Manager Maurice that night, Kimball decided that "due to Respondent's refusal to hire union applicants that he would go on strike." (GC Br. 35.)

In a separate but similar argument, the General Counsel contends that Respondent's claim it did not need to hire any workers was so palpably false it warrants the conclusion that company officials had an unlawful motive they were trying to hide.

[47] 316 NLRB at 854, 856.

> layoff to affect a disproportionate number of identifiable pro-union employees. Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) by laying off employees on October 19. [316 NLRB at 837.]

Although the parallels between the instant issue and the question addressed in *Hankins Lumber Co.* are clear, I believe *Hankins* can be, and should be, distinguished. In the first sentence of the decision quoted above, the Board noted a fact which, in my opinion, makes a crucial difference: "Although the General Counsel disclaimed a 'change of past practice' theory, *he did assert, at the hearing, that the temporary layoffs, including the October 19 layoffs, were unlawful*." (Emphasis added.)

By comparison, in the present case the General Counsel did not contend at trial that the Respondent violated the Act on July 13, 1995. He raised that allegation only after the record closed. Moreover, because of the General Counsel's other actions, the Respondent had no reason to prepare a defense against this "unalleged allegation."

For example, the General Counsel had opposed Respondent's pretrial motion for judgment on the pleadings by stating that the "Complaint contains a clear and concise description of the acts which are claimed to constitute unfair labor practices" and that the "Complaint is sufficiently specific to apprise Respondent of the violations with which it is charged." (GC Exh. 1(t) at 3.) Respondent was entitled to rely upon this assurance and focus its preparation on the actual issues raised in the complaint, rather than spend its time speculating as to what the General Counsel *might* have alleged, but did not.

Clearly, the General Counsel's "sufficiently specific Complaint" did not apprise the Respondent that it would have to defend against an allegation that it had discriminated against Maurice on July 13, 1995. Moreover, even when the General Counsel amended the complaint before and during the hearing, the amendments neither raised nor placed the Respondent on notice that its defense should address an alleged instance of discrimination on July 13.

The absence of notice also denied Respondent an opportunity to meet the issue. While testifying, Maurice expressed some uncertainty as to the date of his first visit. Respondent had no reason to focus on this uncertainty in cross-examination or to seek more precision as to date from its own witnesses. It might well have done so, or presented other evidence on this point, if it had known that the date might become an issue.

In view of all the circumstances discussed above, I find that Respondent would be prejudiced by granting the General Counsel's post hearing motion to amend the complaint. I deny it.

2. Alleged refusal to consider

For the reasons I reached this same conclusion with respect to Phillip Wheeler, I do not find that Respondent refused to consider Maurice for hire when he turned in his application on July 21, 1995. The evidence does not establish the second element of the *Ultrasystems* test, that the Company was then hiring or had concrete plans to hire employees.

In Wheeler's case, I did find that the Respondent began hiring again on August 1, 1995. For the same reasons applied in the case of Wheeler, I find that the General Counsel has established all elements of the *Ultrasystems* analysis, and therefore has made a prima facie case that as of August 1, 1995, Respondent refused to consider Maurice for hire.[48]

However, Respondent asserts that it had no duty to hire Maurice because he was a paid official of a union on strike against the Company. It cites *Sunland Construction Co.*, 309 NLRB 1224, 1231 (1992), in which the Board stated that "we believe that the employer can refuse to hire, during the dispute, an agent of the striking union."

As discussed above, I have found that Maurice did not simply go along with the wishes of the employees, as he professed, but planned and directed both the salting campaign and the strike which was part of it. Indeed, a November 10, 1995 letter on union letterhead, and bearing Maurice's signature, ended the strike. (GC Exh. 5.) The record establishes Maurice's identification with the strike from beginning to end.

Maurice testified that he considered the strike to have ended on November 10, 1995. (Tr. 150.) Therefore, I find that the Respondent did not have a duty to consider him for employment until after that date.

However, and for reasons similar to those in the cases of Wheeler and Davis, I find that Respondent excluded Maurice from consideration after the strike ended. Therefore, I find that beginning November 11, 1995, and continuing at least through the date of hearing, the Respondent failed and refused to consider Maurice for hire in violation of Section 8(a)(3) and (1).

G. The Remedy for Refusal to Consider Applicants for Hire

When the violation found is a refusal to consider applicants for hire, rather than a refusal to hire, it is appropriate to leave to the compliance stage a determination of which discriminatees the Respondent would have hired but for its unlawfully removing them from consideration.[49] Thus, in *Ultrasystems Western Constructors*, above, when the Board directed the respondent to consider the applicants for hire and to provide backpay to those whom it would have hired but for its unlawful conduct, a compliance proceeding was available to determine which applicants the respondent, acting lawfully, would have selected.

In addition to determining which applicants the respondent would have hired, the compliance proceeding should also determine if the respondent would have continued to employ such applicants in other projects after the jobs for which they were hired had been completed. If so, backpay should take into account the denial of opportunity for such other work.

---

[48] To satisfy the fourth element the General Counsel must establish that Maurice was a bona fide job applicant. See, e.g., *Arrow Flint Electric Co.*, 321 NLRB 1208 (1996). This "good faith" requirement, I believe, only concerns the applicant's sincerity in seeking work in the applicant's field of endeavor. I find that Maurice was a bona fide job applicant. *Windemuller Electric*, 306 NLRB 664 (1992); *Blaylock Electric*, 319 NLRB 928, fn. 1 (1995); *NLRB v. Town & Country*, 516 U.S. 85 (1995).

[49] The situation is different when the Board finds that a respondent unlawfully refused to hire an applicant. In that case, the Board concludes "that Respondent had sufficient opportunity to present evidence on this subject during the unfair labor practice hearing in this case and should not be afforded a second chance to defend its unlawful conduct in compliance." See *WestPac Electric*, 321 NLRB 1322 (1996), citing *Casey Electric*, 313 NLRB 774 (1994).

Moreover, if the Respondent would have assigned any of these applicants to current jobs, an issue to be determined at the compliance stage, then Respondent should be ordered to hire those individuals and put them to work in positions substantially equivalent to those for which they applied but for which they were not considered. "Such a remedy," the Board has held, "does no more than place the discriminatees in the position they would have been in absent the Respondent's unlawful conduct." *Ultrasystems Western Constructors*, 316 NLRB at 1243.

H. Alleged Refusal to Reinstate Strikers

1. Ray Singleton

The complaint alleges that Ray Singleton went on strike on July 10, 1995. At this time, no one else had gone on strike or announced that he was going on strike.

The record does not establish that Singleton picketed, handbilled, or otherwise made his protest known to anyone except Owner Benson. Instead, after telling Owner Benson he was going on strike, Singleton began work for another employer at a higher rate of pay.

Initially, two questions arise about Singleton's action. First, although Singleton acted alone, does the law deem his conduct to be concerted and protected. Second, was it a strike?

Based on Benson's account of his conversation with Singleton, which I credit, I do not find that Singleton acted on behalf of other employees. I do not conclude that his activity should be deemed concerted and protected.

Additionally, I do not find that Singleton engaged in a strike. He simply went to work for another company and called it a strike.

Since Singleton was not a striker of any sort, he does not have a right to reinstatement of any sort. Therefore, Respondent did not act unlawfully in failing to accord him reinstatement rights.

2. David Jones

David Jones and John Kimball did go on strike. They picketed the Respondent's jobsite on July 19, 1995. I have found that their object was to cause Respondent to recognize and deal with the Union, and not to protest unfair labor practices. Therefore, Jones and Kimball have the reinstatement rights of economic strikers.

Jones offered to return to work on August 17, 1995, but was not reinstated. As an attachment to Benson's pretrial affidavit establishes, the Respondent was hiring employees during this period, having begun hiring again on August 1, 1995.

As a justification for not reinstating Jones, Benson testified he considered Jones lazy and unproductive, and responsible for installing ungrounded lighting fixtures. However, Benson also admitted that on September 8, 1995, he rehired another employee whom he considered a bad worker. This person, Jimmy Brewer, was classified as a mechanic, the same as Jones.

The record does not establish that Benson considered Jones' problems any worse than Brewer's on that basis, they appeared about equal in Benson's opinion. However, a former economic striker seeking reinstatement occupies a preferential position to new hires. *Harvey Engineering & Mfg. Corp.*, 270 NLRB 1290, 1292 (1984). Jones was entitled to this preference. Additionally, if Respondent had not filled Jones' position with a permanent replacement, Jones would be entitled to reinstatement to his job as of the date of his unconditional offer to return to work.[50]

I conclude that the Respondent would have reinstated Jones but for his protected activities. I further conclude that Jones would have been reinstated on or before September 8, 1995, the date the Respondent hired Brewer instead. Respondent's failure to reinstate Jones violates Section 8(a)(3) and (1) of the Act.

3. John Kimball

As noted, Kimball went on strike with Jones on July 19, 1995. Unlike Jones, Kimball went to work immediately for another employer, at a higher rate of pay. Kimball did not request reinstatement until November 10, 1995, when Union Business Manager Maurice made the offer in a letter to Respondent.

The evidence is insufficient to conclude that Kimball abandoned his strike by taking the job he learned about through the Union. In *Rose Printing Co.*, 304 NLRB 1076, fn. 3 (1991), the Board noted that even if two of the economic strikers in that case had obtained regular and substantially equivalent employment elsewhere "that would not per se establish that [the strikers] had abandoned interest in their prestrike jobs."

Based on the record here, I cannot conclude that the job Kimball accepted was regular, or even that it was substantially equivalent. Although Kimball testified his rate of pay was higher there than when he worked for Respondent, the record does not disclose other factors needed to make a meaningful comparison.

Benson testified that Respondent never replaced Kimball, and the record is clear that it never reinstated Kimball, either. Benson tried to justify the failure to reinstate based upon Kimball's low productivity. However, the fact that Respondent rehired Brewer, whom Benson considered a bad employee, undercuts this asserted justification.

I find that Respondent failed and refused to reinstate Kimball because of his protected activities, in violation of Section 8(a)(3) and (1) of the Act.

4. Douglas Hill

When Jones and Kimball picketed on July 19, 1995, Douglas Hill told the Respondent's office manager that he would not cross the picket line. However, he did continue to work on that date.

Around July 24, 1995, Hill told Benson he was going on strike. He did not picket, but did not make himself available to work for the Respondent until August 25, 1995, when he telephoned Benson to say that he had ended his strike.

I do not find it material that Hill went on strike about 5 days after Jones and Kimball ceased picketing. They had not called off the strike at this point and had not offered to return to work.

[50] An economic striker who has made an unconditional offer to return to work and who has not been permanently replaced is entitled to immediate reinstatement. See, e.g., *Gaywood Mfg. Co.*, 299 NLRB 697, 701 (1990).

Therefore, I find that Hill's action was protected and concerted. Since I have found that the objective of this strike was to cause Respondent to recognize and deal with the Union, Hill has the reinstatement rights of an economic striker.

Hill offered to return to work at a time when the Respondent had been hiring, and continued to hire employees. However, Hill was not reinstated. For the same reasons expressed above, I find that the Respondent's failure to reinstate him constituted discrimination in violation of Section 8(a)(3) and (1) of the Act. The record does not establish the date upon which Hill would have been reinstated, and that issue will be left for determination at the compliance stage.

5. Bobby Lee Barnett

I have found that Bobby Lee Barnett quit work 3 days before he told Respondent he was going on strike. Even assuming that Barnett did engage in a strike against Respondent, he was not an employee at the time and had no right to reinstatement. Respondent's failure to reinstate him did not violate the Act.

I. Alleged Discharge of Douglas Summers

Respondent discharged Douglas Summers on July 24, 1995. The lawfulness of this action will be analyzed under the criteria of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

The record clearly establishes that Summers engaged in extensive union activity. Therefore, the first *Wright Line* requirement has been met.

Further, the General Counsel has established that Respondent knew about Summers' union activities. Benson even asked Summers why he had told the general contractor's representative that he could obtain workers by contacting the union business representative. Clearly, the second *Wright Line* requirement has been satisfied.

Respondent's discharge of Summers constituted an adverse employment action. The General Counsel therefore has proven the third *Wright Line* element.

Timing alone establishes the link necessary to meet the final *Wright Line* requirement. Moreover, when Summers went to the company office on July 24, 1995, to report back to work, Holler's comment that "your buddies went on strike" implies that Respondent associated Summers with the recent union activity.

The General Counsel therefore has proven a prima facie case, and the burden shifts to Respondent to establish that it would have taken the same action against Summers even if he had not engaged in the protected, concerted activity.

Respondent asserts as a defense that Summers was "very unproductive." (Tr. 434.) I must consider this defense in light of what the Respondent knew at the time it terminated Summers. There is no evidence that Respondent knew that Summers had lied about the "emergency" to get 10 days off. Therefore, this matter cannot be placed in the balance when the Respondent's justifications are weighed against the General Counsel's prima facie case.

However, the underlying principle, that the discharge be judged based upon what the Company actually knew at that time, also implies a corollary, that the discharge should be judged based upon the standards of employee conduct and performance in effect at that time. To determine whether the Respondent would have discharged the employee in the absence of discrimination, I must consider what nondiscriminatory factors the Respondent *then* considered important, rather than act as a "Monday morning quarterback" viewing the situation in hindsight.

On July 24, 1995, the Respondent was fighting a deadline crisis caused by low productivity. It appeared that Respondent was overcoming the crisis, but certainly productivity must have been foremost in the mind of Owner Benson.

Benson credibly testified that when Summers began work at the jobsite, the project was not behind, so it clearly must have appeared to Benson that Summers bore responsibility for the unexpected falling behind schedule. Benson at first did not know why Summers was unproductive, but the strike brought the Union's salting campaign to the forefront.

Undoubtedly he became aware of why individuals with good job references and adequate experience proved so disastrously unproductive. As I have inferred from the evidence, slowing down the work was a part of the Union's salting strategy. That fact must have been apparent to Benson after the strike began.

Specifically, Benson testified that he had been very concerned about Summers' lack of productivity. Benson discussed it with Field Coordinator Holler, telling him, "Things are just not happening on that job." In his testimony, Benson then described the various things which Summers should have been getting done, but had not. (Tr. 416.)

When Kimball applied and Benson checked a job reference, he concluded that Kimball was a "great mechanic" and would solve the productivity problem Summers had caused. But Kimball also proved unproductive, which puzzled Benson. "It kind of blew me away," Benson testified, "[B]ecause I thought why in the world we've got some much work to do here, why don't you guys want to work." (Tr. 418.)

On July 19, when Kimball went on strike, the answer became clear. The work slowdown was part of the Union's salting campaign.

All of this discussion would seem, initially at least, to lend weight to the General Counsel's case, rather than showing a nondiscriminatory reason for discharging Summers. However, it is important here to distinguish between union activity, and union activity protected by the Act.

Going on strike is both union activity and, in this case, protected by the Act. A number of other activities, ranging from the display of union insignia on clothing to voicing support for the Union, also enjoy the protection of the law. The Board has made clear that the law protects typical "salting" activities. *M. J. Mechanical Services,* 324 NLRB 812 (1997).

Creating a work slowdown is not protected. *Philips Industries***,** 295 NLRB 717, 732 (1989); *Elk Lumber Co.*, 91 NLRB 333 (1950). All such slowdowns hurt production, but when the work slowdown is covert, as here, its deceptive nature magnifies the harm.

In a covert work slowdown, unlike in a strike, the employee continues to report and continues to draw a paycheck in apparent acceptance of the equation that he will work in return for pay. Yet, instead of doing the amount of work expected, he secretly focuses his intention on producing less. This unpro-

tected conduct harms both the production itself, and management's ability to judge the progress of the job and make the changes needed to keep it on schedule.

The Union's involvement in this tactic may make it union activity, but does not render it protected. Quite legitimately, Respondent may discharge someone for failing to produce, even if the Union told the employee not to do the work as part of a broader scheme. A company does not have to tolerate a willfully slow worker in the hope that the employee will become absentminded and revert to a normal pace for the satisfaction of it.

Summers' intent to slow down the work, readily inferred from the circumstances, distinguishes him from Jimmy Brewer, whom Benson described as a bad employee but rehired anyway. The record does not indicate that Brewer deliberately tried to produce little. His spirit was willing even if his performance was weak. In comparison, Summers had demonstrated both the talent and the willingness to take a project that was on schedule and place it in a tailspin requiring heroic action to prevent a crash.

I conclude that the Respondent would have discharged any employee who produced such a near disaster, even if the employee had no affiliation with the Union and had engaged in no protected activities. Therefore, I find that Respondent has met its burden of rebutting the General Counsel's prima facie case. Respondent's discharge of Summers did not violate the Act, and I recommend that this complaint allegation be dismissed.

CONCLUSIONS OF LAW

1. Forsyth Electrical Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local Union 342 of the International Brotherhood of Electrical Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminatorily refusing to consider Phillip Wheeler and Gregory Davis for employment on and after August 1, 1995, and by discriminatorily refusing to consider Gary Maurice for employment on and after November 11, 1995, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

4. By discriminatorily refusing to grant reinstatement rights to economic strikers David Jones, John Kimball, and Douglas Hill, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

5. The Respondent did not violate the Act by other conduct alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily failed to consider employee applicants Phillip Wheeler, Gregory Davis, and Gary Maurice for hire, it must consider them for employment applying nondiscriminatory standards, and "provide backpay to those it would have hired but for its unlawful conduct." *Ultrasystems Western Constructors*, 316 NLRB 1243, 1244 (1995). In addition, if at the compliance state of this proceeding it is determined that the Respondent would have hired any of the three employee applicants, the inquiry as to the amount of backpay due these individuals will include any amounts they would have received on other jobs to which the Respondent would later have assigned them. Finally, if at the compliance state it is established that the Respondent would have assigned any of these discriminatees to current jobs, Respondent shall be ordered to hire those individuals and place them in positions substantially equivalent to those for which they applied. *H. B. Zachry Co.*, 319 NLRB 967 (1995).

The Respondent has discriminatorily failed to grant reinstatement rights to economic strikers David Jones, John Kimball, and Douglas Hill. The record establishes that the Respondent should have reinstated Jones no later than September 8, 1995, but that he may have been eligible for reinstatement earlier if not permanently replaced. The Respondent must reinstate Jones to his former position, or to a substantially equivalent position if his former position is not available, with backpay to make him whole for Respondent's discrimination against him. However, the exact date on which Jones was entitled to reinstatement may be resolved at the compliance stage.

Respondent did not replace John Kimball, who made an unconditional offer to return to work on November 10, 1995. He was entitled to reinstatement as of that date. Respondent must reinstate Kimball to his former position, or to a substantially equivalent position if his former position is no longer available, with backpay to make him whole for Respondent's discrimination against him.

The Respondent has discriminatorily failed to reinstate Douglas Hill, who unconditionally offered to return to work on August 25, 1995. However, the record does not reflect the exact date on which Hill should have been granted reinstatement to his former position, or to a substantially equivalent position. That matter may be resolved at the compliance stage.[51]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[52]

ORDER

The Respondent, Forsyth Electrical Company, Inc., Winston-Salem, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to consider job applicants for hire because they joined, supported, or assisted Local Union 342, International Brotherhood of Electrical Workers, AFL–CIO, or engaged in

[51] In all instances in which the discriminatees herein are entitled to backpay, it shall be calculated in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[52] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

protected, concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(b) Refusing to reinstate economic strikers who have made unconditional offers to return to work and who have not been permanently replaced, to their former positions or, if their former positions no longer are available, to substantially equivalent positions, because they joined, supported, or assisted Local Union 342, International Brotherhood of Electrical Workers, AFL–CIO, or engaged in protected, concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(c) Refusing to grant economic strikers preferential reinstatement rights, as provided in *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 97 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970), because they joined, supported, or assisted Local Union 342, International Brotherhood of Electrical Workers, AFL–CIO, or engaged in protected, concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Phillip Wheeler, Gregory Davis, and Gary Maurice for any losses they may have suffered by reason of the Respondent's discriminatory refusal to consider them for hire in the manner described in this Decision and Order. Offer to each of these employee applicants who would have been employed by Respondent but for the Respondent' unlawful refusal to consider him for hire, and to the full extent required by *Ultrasystems Western Constructors*, 316 NLRB 1243 (1995), employment, in the position for which he applied for or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges to which he would have been entitled if he had not been discriminated against by the Respondent.

(b) Offer immediate and full reinstatement to David Jones, John Kimball, and Douglas Hill, and make them whole, with interest, for any losses they may have suffered by reason of the Respondent's discriminatory refusal to reinstate them.

(c) Within 14 days after service by the Region, post at its facilities in Winston-Salem, North Carolina, and at its other jobsites within the State of North Carolina, copies of the attached notice marked "Appendix."[53] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 24, 1995.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

[53] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."